CLERK'S COPY.

CERTIFICATE

Supreme Court of the United States

OCTOBER TERM, ~~1929~~ 1930

No. ~~575~~ 29

CLINTON R. WHITE

vs.

GEORGE E. Q. JOHNSON AND H. D. HAYES

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

FILED JANUARY 15, 1930

(34,704)

(34,704)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 573

CLINTON R. WHITE

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GEORGE E. Q. JOHNSON AND H. D. HAYES

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

INDEX

	Original	Print
Certificate from the United States circuit court of appeals, seventh circuit	1	1
Statement of facts	1	1
Questions certified	6	6
Clerk's certificate (omitted in printing)	9	

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 2, 1930

[fol. 1]

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, TUESDAY, DECEMBER 3, 1929

4119

CLINTON R. WHITE

vs.

GEORGE E. Q. JOHNSON and H. D. HAYES

Appeal from the United States District Court of the Northern District of Illinois, Eastern Division

STATEMENT OF FACTS

On this appeal certain questions of law have arisen, concerning which this court is in doubt and desires the instruction of the Supreme Court.

The relevant facts out of which the legal questions grow are:

Appeal was taken to this court from an order entered October 16, 1928, by the United States District Court for the Northern District of Illinois, denying application of plaintiff-appellant for an injunction pendente lite against defendants. The injunction prayed for was to restrain the United States Attorney for the Northern District of Illinois and the local Supervisor of Radio, Department of Commerce, from enforcing the penal provisions (Secs. 32 and 33) of the Radio Act of 1927 against plaintiff either for violation of the provisions of that Act or for violation of an order of the Federal Radio Commission dated August 22, 1928.

[fol. 2] Since August 15, 1926, appellant has continuously owned and operated a radio station in the City of Chicago of the type and character commonly known as a broadcasting station, under the call letters WCRW. Appellant has had successive licenses, first from the Secretary of Commerce under the Act to Regulate Radio Communication of August 13, 1912, and, after the enactment of the Radio Act of 1927 on February 23, 1927, from the Federal Radio Com-

mission. Appellant's first license from the Secretary of Commerce was issued August 15, 1926, as a result of an application therefor by appellant in which application appellant designated the normal sending wave-length of his station as 720 kc. and requested the call-letters WCRW. The license covered a period of three months and, on its expiration, was succeeded by a succession of licenses similar in form and in duration, each issued by the Secretary of Commerce on the application of appellant, until the termination of said Secretary's authority by the Radio Act of 1927. On February 10, 1927, in compliance with the Joint Resolution of Congress, approved December 8, 1926, and as part of an application for licenses attached thereto, appellant executed and filed with the Secretary of Commerce a statement as follows:

"The applicant hereby waives any right or any claim of right, as against the United States, to any wave-length, or to the use of the ether in radio transmission, because of previous license to use the same or because of the use thereof."

From August 15, 1926, until April 26, 1917, appellant operated his station with a power of 1,000 watts.

After the establishment of the Federal Radio Commission, the Commission issued successive licenses to appellant from time to time, each license being preceded by a written application executed, sworn to, and filed by appellant. Each application contained the following statement:

[fol. 3] "The applicant waives any claim to the use of any particular frequency or wave length or of the ether as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise, and requests a radio station license in accordance with this application."

Each license issued by the Commission to appellant contained the following condition:

"This station license shall not vest in the licensee any right to operate the station nor any right in the use of the frequencies or wave-length designated in the license beyond

the term thereof nor in any other manner than authorized therein."

The licenses issued by the Commission from time to time were for varying periods but never in excess of three months.

The first license issued by the Commission was dated April 26, 1927, and authorized appellant to operate his station on 760 kc. with 500 watts. The next license was dated June 15, 1927, and authorized appellant to operate his station on 1340 kc. with 500 watts. All licenses thereafter until September 1, 1928, authorized appellant to operate on 1340 kc. with 500 watts. Under all licenses issued by the Commission appellant has had to divide time with two other stations.

Since September 1, 1928, as a result of action of the Commission taken on August 22, 1928, appellant has been authorized to operate his station with only 100 watts, on a division of time with two other stations. This action of the Commission, which led to the filing of the bill of complaint herein by appellant, was preceded by the following proceedings:

On January 12, 1928, appellant duly filed an application for a renewal of the license then held by him (for 500 watts on 1340 kc. on a division of time with two other broadcasting stations). This license originally covered a period of sixty (60) days beginning November 1, 1927, but was extended from time to time for short periods of from thirty to sixty days so that it finally expired on September 1, 1928. [fol. 4] On May 25, 1928, the Commission entered an order known as General Order 32 in which, after reciting that it had examined appellant's said application for renewal of license, together with similar applications on the part of 163 other broadcasting stations, and that it was not satisfied that public interest, convenience or necessity would be served by granting any of said applications, the Commission fixed Monday, July 9, 1928, ten o'clock A. M. in its offices at Washington, D. C., as the time and place for a hearing on each of said applications. The Commission notified appellant of the order by mailing a copy of it to appellant, which copy was accompanied by a letter addressed to appellant stating, among other things:

"At this hearing unless you can make an affirmative showing that public interest, convenience or necessity will be served by the granting of your application, it will be finally denied."

Similar letters accompanied by copies of the order were sent to the 163 other broadcasting stations covered by the order.

On July 9, 1928, appellant appeared before the Commission by counsel, as did a large proportion of the other broadcasting stations included in the order, and hearings on the applications of said stations were set at various times during the following two weeks. The hearing on appellant's application for renewal was held partly on July 16, 1928, and partly on July 23, 1928.

On August 22, 1928, the Commission took action with reference to appellant's application as follows:

"Federal Radio Commission, Washington, D. C.

File No. 138. Docket No. 109

"In re Application of Clinton R. White, Station WCRW, for Renewal of License

[fol. 5] "Order

"The Commission having considered the evidence and the arguments presented to it in the above-entitled case, heretofore heard and taken under advisement, and having found that public interest, convenience or necessity would not be served by granting said application unless the power heretofore used by the applicant be reduced to 100 watts, and then only subject to such changes in authorized frequency, power, and hours of operation as the Commission may in the future find to be in the public interest, convenience or necessity, or necessary in order to comply with the provisions of Section 5 of the Radio Act of 1928, and further subject to such extension or extensions of the applicant's existing license, thus modified with respect to authorized power, as the Commission may hereafter order.

"It is ordered that, pending the issuance of a renewal of said license in accordance with said findings, the existing

license of said applicant be, and the same is hereby, modified by reducing the power authorized therein to 100 watts; this order to be effective on September 1, 1928, at the hour of 3 o'clock A. M., Eastern Standard Time.

"It is further ordered that said existing license, thus modified, be, and the same is hereby, further extended for a period of thirty (30) days to terminate at 3 o'clock a. m. Eastern Standard Time, October 1, 1928.

"Federal Radio Commission, by Ira E. Robinson, Chairman.

"Dated August 22nd, 1928."

Appellant received a copy of the foregoing on or about August 24, 1928. Appellant filed his bill of complaint on September 12, 1928.

[fol. 6] The approximate value of the physical equipment constituting appellant's station is $5,000.00. Up to the time of filing his bill of complaint appellant had expended approximately $16,472.89 in the operation of the station. The gross revenues derived by appellant from the station, consisting of payments by advertisers for the broadcasting of advertising material from the station, amounted to $160.00 in 1926 (4½ months, $7,433.45 in 1927, and $8,925.87 in 1928 (7 months). It does not appear that on or prior to February 23, 1927, appellant's station was operating at a profit and presumably it was not. At the time of filing the bill of complaint and for some time prior thereto, however, appellant's net profits from the station were about $400.00 a week. Appellant is dependent upon this income as his chief source of livelihood.

The physical equipment constituting appellant's station is so designed that it will not operate efficiently or satisfactorily with power as low as 100 watts. To broadcast efficiently and satisfactorily with 100 watts appellant will have to replace a very substantial portion of his present apparatus with new and different apparatus. The reduction in power has caused a reduction in the area served by appellant's station to not more than one-fourth its former size with the result that appellant has lost a large proportion of his listening public and his advertising clientele.

Questions Certified

The questions concerning which this court desires advise are herewith presented:

Question 1. Did a person who, prior to the enactment of the Radio Act of 1927, applied for and was granted successive licenses by the Secretary of Commerce for the operation of a broadcasting station, and who owned and continuously operated such broadcasting station, whereby it developed a following of listeners and advertisers which constituted a going business, have or acquire thereby property [fol. 7] in the continued operation of such station, with power appropriate to continue the operation of said business, within the meaning of the word "property" as used in the Fifth Amendment to the Constitution of the United States?

Question 2. If the answer to Question 1 is in the affirmative, is the Joint Resolution of Congress of December 8th, 1926 valid as against the claim that by virtue of the waiver it requires it works a deprivation of such property without due process of law or a taking of private property for public use without just compensation?

Question 3. If the answer to Question 1 is in the affirmative, is the Radio Act of 1927, as amended, valid as against the claim that, by virtue of the waiver required in the last paragraph of Section 5 and by virtue of the condition required to be contained in all licenses by subparagraph (A) of Section 11, it works a deprivation of such property without due process of law or a taking of private property for public use without just compensation?

Question 4. If the answer to Question 1 is in the affirmative, is the Radio Act of 1927, as amended, valid as against the claim that it authorizes or requires the Federal Radio Commission, in its action on an application for renewal of license by a person such as is described in Question 1, to take private property for public use without just compensation, either by denying such application or by granting it on such terms as virtually to destroy a going broadcasting business of such person?

Question 5. If the answer to Question 1 is in the affirmative, is the Radio Act of 1927, as amended, valid as against the claim that it authorizes or requires the Federal Radio Commission, in acting upon an application for renewal of license by said person, to deprive such person of such prop-
[fol. 8] erty without due process of law, in that the only standards provided by the Act for the guidance of the Commission in acting upon such applications are that of "public interest, convenience or necessity" and that set forth in Section 5 of the Amendatory Act of March 28, 1928, and in that the Act fails to require that the Commission, prior to proceeding to a hearing or decision on such application, shall specify in what respect it deems or has failed to find that the granting of such application would not serve public interest, convenience or necessity?

The clerk of this court is hereby directed to transmit a certified copy hereof to the Supreme Court of the United States.

[fol. 9] Clerk's certificate to foregoing omitted in printing.

Endorsed on cover: File No. 34,704. U. S. Circuit Court of Appeals, Seventh Circuit. Term No. 573. Clinton R. White vs. George E. Q. Johnson and H. D. Hayes. Certificate. Filed January 15, 1930. File No. 34,704.

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CHARLES L. [illegible] CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1929.

No. [redacted] 29

CLINTON R. WHITE,

vs.

GEORGE E. Q. JOHNSON AND H. D. HAYES.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Brief for Appellant.

HENRY K. URION,
HENRY W. DRUCKER,
Solicitors for Appellant.

HAWKINS & LOOMIS CO., LAW PRINTERS, CHICAGO

INDEX.

	PAGE
Jurisdiction	1
Questions Certified	1
Constitutional Provisions and Statutes Involved (See Appendix)	37
Statement	3
Summary of Argument	8
Argument:	
I. The right to continue the operation of a radio broadcasting station, established prior to the enactment of the Radio Act of 1927, with power appropriate to reach the territory it has served is "property" within the meaning of the Fifth Amendment to the Constitution	11
II. Deprivation of the right of an established broadcasting station to continue the operation thereof with appropriate power to reach the territory it has served, is a taking of the property of such station in violation of the Fifth Amendment. The Radio Act of 1927 authorizes such action by the Federal Radio Commission, either by denying an application for renewal of the license of such station or by granting it on such terms as virtually to destroy the going business thereof, hence is invalid, because taking private property for public use	22
III. The waivers required by the Joint Resolution of Congress of December 8, 1926, and by the Radio Act of 1927, are invalid	28
IV. The standard of "public interest, convenience, or necessity," provided by the Radio Act of 1927 for determination by the Federal Radio Commission of its denial of licenses to pre-existing radio broadcasting stations, is so indefinite that such action by the Commission constitutes a taking of property without due process of law	32
Conclusion	35
Appendix: Constitutional provision and statutes involved	37

CITATIONS.

Cases:

	PAGE
Adair v. United States, 208 U. S. 161	20, 28
Adams v. Tanner, 244 U. S. 590	28
Allgeyer v. State of Louisiana, 165 U. S. 578	20, 28
Atchison v. Peterson, 20 Wall. 507	14, 15, 22
Champion v. Ames, 188 U. S. 321	23
Cole v. La Grange, 133 U. S. 1	26
Columbia Mill Co. v. Alcorn, 150 U. S. 460	12
Dent v. State of West Virginia, 129 U. S. 114	20
Frost v. Railroad Commission, 271 U. S. 583	31
Gibbons v. Ogden, 9 Wheat. 1	23
Gibson v. United States, 166 U. S. 269	16
Greenleaf-Johnson Lumber Co. v. Garrison, 237 U. S. 251	22
Hammer v. Dagenhart, 247 U. S. 251	23
Hewitt v. Board of Medical Examiners, 148 Cal. 590	33
Hipolite Egg Co. v. United States, 220 U. S. 45	23
Hoke v. United States, 227 U. S. 308	23
Home Insurance Company of New York v. Morse, 20 Wall. 445	30
Hoover v. Intercity Radio Co., 286 Fed. 1003	21
Interstate Commerce Commission v. Louisville and Nashville Railroad Company, 227 U. S. 88	34
James Clark Distilling Co. v. Western Maryland Ry. Co., 242 U. S. 311	23
Jennison v. Kirk, 98 U. S. 453	13
Lewis Blue Point Oyster Cultivation Co. v. Briggs, 229 U. S. 82	17
Lochner v. New York City, 198 U. S. 45	20, 28
Los Angeles Gas and Electric Co. v. City of Los Angeles, 241 Fed. 912 (affirmed 251 U. S. 32)	12, 26
Louis K. Liggett Co. v. Baldridge, 278 U. S. 105	19
Missouri Pacific Railway Co. v. Nebraska, 164 U. S. 403	26
Monongahela Navigation Co. v. U. S., 148 U. S. 312	18, 22, 23
Pennsylvania Coal Co. v. Mahon, 260 U. S. 393	20, 27

PAGE

Philadelphia Co. v. Stimson, 223 U. S. 605 16
Powell v. Pennsylvania, 127 U. S. 678 20
Pullman Co. v. Kansas, 216 U. S. 56 29
Pumpelly v. Green Bay and Mississippi Canal Co., 80 U. S. (13 Wall.) 166 ..... 18, 24
Scranton v. Wheeler, 179 U. S. 141 16
Smith v. Texas, 233 U. S. 630 20
Southern P. Co. v. Denton, 146 U. S. 202 30
Terral v. Burke Construction Company, 257 U. S. 529 30
Tribune Co. v. Oak Leaves Broadcasting Station, Inc. (unreported) 19
Truax v. Corrigan, 257 U. S. 312 28
United States v. Chandler-Dunbar Water Power Company, 229 U. S. 53 16
United States v. Cress, 243 U. S. 316 ..... 17, 25
United States v. Lynah, 188 U. S. 445 ..... 18, 24
United States v. Zenith Radio Corporation, 12 Fed. (2d) 614 21
Weaver v. Palmer Brothers Company, 270 U. S. 402 28
Western Union Telegraph Company v. Kansas, 216 U. S. 1 30
Whitfield v. Hanges, 222 Fed. 745 35
Wichita Railroad and Light Company v. Public Utilities Commission, 260 U. S. 48 35
Yick Wo v. Hopkins, 118 U. S. 356 33
Congressional Record, Vol. 68, Part I, P. 216-219 19

Opinions of Attorney General:

29 Op. Atty. Gen. 579 21
35 Op. Atty. Gen. 126 21

Texts:

Blackstone's Commentaries, Book II, Chapter 1 11
de Vattel, Emer, Law of the Nations, Vol. III 12
Moore, Digest of International Law 12

Constitution and Statutes:

Fifth Amendment to Constitution 37
Radio Act of 1912 ..... 20, 43

PAGE

Radio Act of 1927:
Sections 1 37
4 38
6 39
9 40
11 40
12 41
14 42
16 42
31 43
39 43
Joint Resolution of Congress of December 8, 1926.... 28

No. 573

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1929.

CLINTON R. WHITE,

vs.

GEORGE E. Q. JOHNSON AND H. D. HAYES.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR APPELLANT.

Jurisdiction.

The case is here on Certificate from the United States Court of Appeals for the Seventh Circuit, under Section 239 of the Judicial Code, as amended by the Act of February 13, 1925.

Questions certified.

The questions presented by the Certificate are these:

Question 1. Did a person who, prior to the enactment of the Radio Act of 1927, applied for and was granted successive licenses by the Secretary of Commerce for the operation of a broadcasting station, and who owned and continuously operated such broadcasting station, whereby it developed a following of listeners and advertisers which constituted a going business, have or acquire thereby property (fol. 7) in the continued operation of such station, with power appropriate to continue the operation of

said business, within the meaning of the word "property" as used in the Fifth Amendment to the Constitution of the United States?

Question 2. If the answer to Question 1 is in the affirmative, is the Joint Resolution of Congress of December 8th, 1926, valid as against the claim that by virtue of the waiver it requires it works a deprivation of such property without due process of law or a taking of private property for public use without just compensation?

Question 3. If the answer to Question 1 is in the affirmative, is the Radio Act of 1927, as amended, valid as against the claim that, by virtue of the waiver required in the last paragraph of Section 5 and by virtue of the condition required to be contained in all licenses by subparagraph (A) of Section 11, it works a deprivation of such property without due process of law or a taking of private property for public use without just compensation?

Question 4. If the answer to Question 1 is in the affirmative, is the Radio Act of 1927, as amended, valid as against the claim that it authorizes or requires the Federal Radio Commission, in its action on an application for renewal of license by a person such as is described in Question 1, to take private property for public use without just compensation, either by denying such application or by granting it on such terms as virtually to destroy a going broadcasting business of such person?

Question 5. If the answer to Question 1 is in the affirmative, is the Radio Act of 1927, as amended, valid as against the claim that it authorizes or requires the Federal Radio Commission, in acting upon an application for renewal of license by said person, to deprive such person of such property (fol. 8) without due process of law, in that the only standards provided by the Act for the guidance of the Commission in acting upon such applications are that of "public interest, convenience or necessity" and that set forth in Section 5 of the Amendatory Act of March 28, 1928, and in that the Act fails to require that the Commission, prior to proceeding to a hearing or decision on such application, shall specify in what respect it deems or has failed to find that the granting of such application would not serve public interest, convenience or necessity?

Constitutional provisions and statutes involved.

The relevant portions of the Constitution and of the Statutes are printed as an appendix hereto.

Statement.

The Certificate (p. 1) sets forth the facts as follows:

Appeal was taken to this court from an order entered October 16, 1928, by the United States District Court for the Northern District of Illinois, denying application of plaintiff-appellant for an injunction *pendente lite* against defendants. The injunction prayed for was to restrain the United States Attorney for the Northern District of Illinois and the local Supervisor of Radio, Department of Commerce, from enforcing the penal provisions (Secs. 32 and 33) of the Radio Act of 1927 against plaintiff either for violation of the provisions of that Act or for violation of an order of the Federal Radio Commission dated August 22, 1928.

[fol. 2] Since August 15, 1926, appellant has continuously owned and operated a radio station in the City of Chicago of the type and character commonly known as a broadcasting station, under the call letters WCRW. Appellant has had successive licenses, first from the Secretary of Commerce under the Act to Regulate Radio Communication of August 13, 1912, and, after the enactment of the Radio Act of 1927 on February 23, 1927, from the Federal Radio Commission. Appellant's first license from the Secretary of Commerce was issued August 15, 1926, as a result of an application therefor by appellant in which application appellant designated the normal sending wave-length of his station as 720 kc. and requested the call-letters WCRW. The license covered a period of three months and, on its expiration, was succeeded by a succession of licenses similar in form and in duration, each issued by the Secretary of Commerce on the application of appellant, until the termination of said Secretary's authority by the Radio Act of 1927. On February 10,

1927, in compliance with the Joint Resolution of Congress, approved December 8, 1926, and as part of an application for licenses attached thereto, appellant executed and filed with the Secretary of Commerce a statement as follows:

"The applicant hereby waives any right or any claim of right, as against the United States, to any wave-length, or to the use of the ether in radio transmission, because of previous license to use the same or because of the use thereof."

From August 15, 1926, until April 26, 1927, appellant operated his station with a power of 1,000 watts.

After the establishment of the Federal Radio Commission the Commission issued successive licenses to appellant from time to time, each license being preceded by a written application executed, sworn to, and filed by appellant. Each application contained the following statement:

[fol. 3] "The applicant waives any claim to the use of any particular frequency or wave length or of the ether as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise, and requests a radio station license in accordance with this application."

Each license issued by the Commission to appellant contained the following condition:

"This station license shall not vest in the licensee any right to operate the station nor any right in the use of the frequencies or wave-length designated in the license beyond the term thereof nor in any other manner than authorized therein."

The licenses issued by the Commission from time to time were for varying periods but never in excess of three months.

The first license issued by the Commission was dated April 26, 1927, and authorized appellant to operate his station on 760 kc. with 500 watts. The next license was dated June 15, 1927, and authorized appellant to operate his station on 1340

kc. with 500 watts. All licenses thereafter until September 1, 1928, authorized appellant to operate on 1340 kc. with 500 watts. Under all licenses issued by the Commission appellant has had to divide time with two other stations.

Since September 1, 1928, as a result of action of the Commission taken on August 22, 1928, appellant has been authorized to operate his station with only 100 watts, on a division of time with two other stations. This action of the Commission, which led to the filing of the bill of complaint herein by appellant, was preceded by the following proceedings:

On January 12, 1928, appellant duly filed an application for a renewal of the license then held by him (for 500 watts on 1340 kc. on a division of time with two other broadcasting stations). This license originally covered a period of sixty (60) days beginning November 1, 1927, but was extended from time to time for short periods of from thirty to sixty days so that it finally expired on September 1, 1928. [fol. 4] On May 25, 1928, the Commission entered an order known as General Order 32 in which, after reciting that it had examined appellant's said application for renewal of license, together with similar applications on the part of 163 other broadcasting stations, and that it was not satisfied that public interest, convenience or necessity would be served by granting any of said applications, the Commission fixed Monday, July 9, 1928, ten o'clock A. M. in its offices at Washington, D. C., as the time and place for a hearing on each of said applications. The Commission notified appellant of the order by mailing a copy of it to appellant, which copy was accompanied by a letter addressed to appellant stating, among other things:

"At this hearing unless you can make an affirmative showing that public interest, convenience or necessity will be served by the granting of your application, it will be finally denied."

Similar letters accompanied by copies of the order were sent to the 163 other broadcasting stations covered by the order.

On July 9, 1928, appellant appeared before the Commission by counsel, as did a large proportion of the other broadcasting stations included in the order, and hearings on the applications of said stations were set at various times during the following two weeks. The hearing on appellant's application for renewal was held partly on July 16, 1928, and partly on July 23, 1928.

On August 22, 1928, the Commission took action with reference to appellant's application as follows:

"Federal Radio Commission, Washington, D. C.

File No. 138. Docket No. 109.

"In re Application of Clinton R. White, Station WCRW, for Renewal of License.

[fol. 5] "Order

"The Commission having considered the evidence and the arguments presented to it in the above-entitled case, heretofore heard and taken under advisement, and having found that public interest, convenience or necessity would not be served by granting said application unless the power heretofore used by the applicant be reduced to 100 watts, and then only subject to such changes in authorized frequency, power, and hours of operation as the Commission may in the future find to be in the public interest, convenience or necessity, or necessary in order to comply with the provisions of Section 5 of the Radio Act of 1928, and further subject to such extension or extensions of the applicant's existing license, thus modified with respect to authorized power, as the Commission may hereafter order.

"It is ordered that, pending the issuance of a renewal of said license in accordance with said findings, the existing

license of said applicant be, and the same is hereby, modified by reducing the power authorized therein to 100 watts; this order to be effective on September 1, 1928, at the hour of 3 o'clock A. M., Eastern Standard Time.

"It is further ordered that said existing license, thus modified, be, and the same is hereby, further extended for a period of thirty (30) days to terminate at 3 o'clock a. m. Eastern Standard Time, October 1, 1928.

"Federal Radio Commission, by Ira E. Robinson, Chairman.

"Dated August 22nd, 1928."

Appellant received a copy of the foregoing on or about August 24, 1928. Appellant filed his bill of complaint on September 12, 1928.

[fol. 6] The approximate value of the physical equipment constituting appellant's station is $5,000.00. Up to the time of filing his bill of complaint appellant had expended approximately $16,472.89 in the operation of the station. The gross revenues derived by appellant from the station, consisting of payments by advertisers for the broadcasting of advertising material from the station, amounted to $160.00 in 1926, (4½ months), $7,433.45 in 1927, and $8,925.87 in 1928 (7 months). It does not appear that on or prior to February 23, 1927, appellant's station was operating at a profit and presumably it was not. At the time of filing the bill of complaint and for some time prior thereto, however, appellant's net profits from the station were about $400.00 a week. Appellant is dependent upon this income as his chief source of livelihood.

The physical equipment constituting appellant's station is so designed that it will not operate efficiently or satisfactorily with power as low as 100 watts. To broadcast efficiently and satisfactorily with 100 watts appellant will have to replace a very substantial portion of his present apparatus with new and different apparatus. The reduction in power has caused

a reduction in the area served by appellant's station to not more than one-fourth its former size with the result that appellant has lost a large proportion of his listening public and his advertising clientele.

Summary of Argument.

I. A radio broadcasting station established prior to the enactment of the Radio Act of 1927 acquired a property right, within the meaning of the Fifth Amendment, in the continued operation of such station with power appropriate to reach the territory it has served. The establishment and operation of such station was a utilization of a part of the total facilities available for broadcasting, hence, figuratively speaking, was an appropriation of such *quantum* of the "ether" as was utilized in the operation of such station without interference with other stations, on the principle of "first in use, prior in right." Such use of the ether constituted a property right similar to that acquired in the diversion and use of the waters of non-navigable streams on the public domains of the Western states. Furthermore, broadcasting is an occupation in which the proprietor of a broadcasting station had the right to engage, and the continued conduct of such business is a property right within the meaning of the Fifth Amendment.

The right of Congress to take or destroy private property on navigable waters in the aid of navigation is not a proper analogy from which to argue that a broadcaster acquired no property right "in the air" that was not subject to appropriation by Congress. Navigable waters have always been a highway of commerce, and title to private property thereon is acquired subject to the dominant servitude of use for navigation. Hence, when a privately-owned oyster bed under navigable waters is destroyed in dredging a channel to improve navigation, the owners are not entitled to compensation, because it

was planted with the possibility of such contingency. The broadcasting medium termed "the ether," on the contrary, was not subject to such prior use. It was, in fact, virtually created, as a practical, commercial medium, by broadcasting itself.

The Radio Act of 1912, enacted to apply to radio telegraphy, permitted public notice of the claim of rights of broadcasters licensed thereunder, being, in effect, but a registration statute. Licenses issued under it were terminable only for cause, or in case of war licensed stations might be taken upon payment of just compensation. The issuance of licenses constituted a recognition on the part of the government of the right to establish such broadcasting stations. The broadest application that can be made of that Act is that licenses thereunder were expressly made subject to future regulation of Congress. Such provision, however, did not limit the rights of licensees, because if radio broadcasting constitutes interstate commerce that is subject to regulation by Congress, it would have such power, whether or not expressly reserved by the provision of that Act.

II. Destruction of such a broadcasting station as a going business, either by reduction of power or refusal of license, is a taking of the property of such station in violation of the Fifth Amendment. If Congress has any authority over radio broadcasting it is the power to *regulate* broadcasting as interstate commerce. Such authority must be exercised under constitutional limitations. The power to *regulate* does not include the power to destroy or confiscate private property. If necessary to take private property for the public welfare in the regulation of radio broadcasting, just compensation must be paid. Depriving an owner of the use of his property is a taking of that property as much as if the actual physical property were taken.

III. The waiver requirements of the Joint Resolution of Congress of December 8, 1926, and of the Radio Act of 1927, are equally repugnant to the Fifth Amendment if such waivers be construed to prevent the assertion of previously acquired property rights of the licensees required to execute such waivers. The indirect deprivation of a Constitutional right by a grant of privilege from the legislature conditioned upon waiving that Constitutional right is void as would be the direct deprivation of such Constitutional right.

IV. The Radio Act of 1927 is invalid because it authorizes or requires the Federal Radio Commission to act upon the application for renewal of the license of a previously established broadcasting station by determining whether the operation of such station would be for "public interest, convenience or necessity." Such a standard is meaningless when applied to radio broadcasting, for there are no previously established criteria of what is "public interest, convenience or necessity" as applied to broadcasting. Furthermore, the Commission was not required and did not, as a matter of practice, specify in what respects it deemed or failed to find that the granting of such application would not serve "public interest, convenience or necessity." Therefore, an applicant could have no issues to which he might address himself. Of necessity, the decision by the Commission was merely an arbitrary determination, based only on its own state of mind, and not on predetermined standards or issues. Such a proceeding lacks the requirements of due process of law.

ARGUMENT.

I.

The right to continue the operation of a radio broadcasting station, established prior to the enactment of the Radio Act of 1927, with power appropriate to reach the territory it has served, is "property" within the meaning of the Fifth Amendment to the Constitution.

The development of radio broadcasting during the last decade constituted a new utilization by man of a natural phenomenon that had never before been so used. Because the phenomenon is not thoroughly understood and for want of better terminology it is said that the radio waves are broadcast through the "ether." The number of stations that can broadcast, without interference with each other, is limited. Hence, each such station utilizes a part of the total facilities that are available for broadcasting. Therefore, the establishment of a broadcasting station, regularly operating with fixed power, constituted an appropriation of such *quantum* of the "ether" as was necessary for its operation with that amount of power, to the exclusion of other stations which would cause interference with its broadcasting. Such appropriation, whatever be the medium or the nature of the phenomenon of radio broadcasting, constitutes a property right on the same principles that have come down through the ages from the origin of ownership of property.

Blackstone treats of the right of property as founded upon priority of possession (Blackstone's Commentaries, Book II, Chapter 1, page 9):

> "Property, both in lands and movables, being thus originally acquired by the first taker, which taking amounts to a declaration that he intends to appropriate

> the thing to his own use, it remains in him, by the principles of universal law, till such times as he does some other act which shows an intention to abandon it. * * *"

Similarly, Emer de Vattel expounds the right of the first occupant in "Law of the Nations," Vol. III, page 84:

> "All men have an equal right to those things which have not yet come into the possession of anyone, and these things belong to the person who first takes possession. The right of the first comer (*jus praeventionis*) should be faithfully observed in the use of common property which cannot be used by several persons at the same time."

Right of property through priority of occupation is recognized in territorial acquisition. "Title by occupation is gained by the discovery, use and settlement of territory not occupied by a civilized power." Moore, "Digest of International Law," p. 258.

Similarly, the exclusive right to use a mark or device claimed as a trade-mark is founded upon priority of use, constituting a property right. *Columbia Mill Co.* v. *Alcorn*, 150 U. S. 460.

In determining the respective right of competing public utilities operating in the same field, priority of time gives superiority of right in the location of their respectve physical properties. In *Los Angeles Gas and Electric Co.* v. *City of Los Angeles*, 241 Fed. 912 (affirmed 251 U. S. 32), the District Court said (p. 919):

> "When, however, pursuant to the terms of its lawful franchise, it has established its poles and wires and other instrumentalities in the public streets, it may lawfully and properly object to being compelled to remove or relocate them in order that another company, a competitor of later origin and right coming in, may take their place and thereby be enabled to carry on its own intended business. In other words, in this as in many other relations, first in time is first in right, and superiority of right consequent upon being first in time may not be nullified by even necessary requirements of a competitor or other utility later in time and therefore inferior in right."

The property right of a broadcasting station to the use of such *quantum* of the ether as was required for the transmission of the broadcasting waves emanating from that station with the power upon which it operated, is perhaps, best established by the doctrine of priority of appropriation as applied to water rights in non-navigable streams of the Western states. Rights to the use of water in flowing streams and the right to the use of the ether for broadcasting are similar in nature, both being usufructuary rather than absolute and the property right to the continued use of both media being acquired by priority of appropriation.

The development of that doctrine following the discovery of gold in California was described by Mr. Justice Field in *Jennison* v. *Kirk*, 98 U. S. 453 (p. 457):

> "The discovery of gold in California was followed, as is well known, by an immense immigration into the State, which increased its population within three or four years from a few thousand to several hundred thousand. The lands in which the precious metals were found belonged to the United States, and were unsurveyed, and not open, by law, to occupation and settlement. Little was known of them further than that they were situated in the Sierra Nevada mountains. Into these mountains the emigrants in vast numbers penetrated, occupying the ravines, gulches and canyons, and probing the earth in all directions for the precious metals. Wherever they went, they carried with them that love of order and system and of fair dealing which are the prominent characteristics of our people. In every district which they occupied they framed certain rules for their government, by which the extent of ground they could severally hold for mining was designated, their possessory right to such ground secured and enforced, and contests between them either avoided or determined. These rules bore a marked similarity, varying in the several districts only according to the extent and character of the mines; distinct provisions being made for different kinds of mining, such as placer mining, quartz mining and mining in drifts or tunnels. They all recognized discovery, followed by appropriation, as the foundation of the possessor's title, and development by working as the condition of its retention. And they were so framed as to secure to all com-

ers, within practicable limits, absolute equality of right and privilege in working the mines. Nothing but such equality would have been tolerated by the miners, who were emphatically the lawmakers, as respects mining, upon the public lands in the State. The first appropriator was everywhere held to have, within certain well defined limits, a better right than others to the claims taken up; and in all controversies, except as against the government, he was regarded as the original owner, from whom title was to be traced. But the mines could not be worked without water. Without water the gold would remain forever buried in the earth or rock. To carry water to mining localities, when they were not on the banks of a stream or lake, became, therefore, an important and necessary business in carrying on mining. Here, also, the first appropriator of water to be conveyed to such localities for mining or other beneficial purposes, was recognized as having, to the extent of actual use, the better right. The doctrines of the common law respecting the rights of riparian owners were not considered as applicable, or only in a very limited degree, to the condition of miners in the mountains. The waters of rivers and lakes were, consequently, carried great distances in ditches and flumes, constructed with vast labor and enormous expenditures of money, along the sides of mountains and through canyons and ravines, to supply communities engaged in mining, as well as for agriculturists and ordinary consumption. Numerous regulations were adopted, or assumed to exist, from their obvious justness, for the security of these ditches and flumes, and the protection of rights to water, not only between different appropriators, but between them and the holders of mining claims. These regulations and customs were appealed to in controversies in the State courts, and received their sanction; and properties to the value of many millions rested upon them. For eighteen years, from 1848 to 1866, the regulations and customs of miners, as enforced and molded by the courts and sanctioned by the legislation of the State, constituted the law governing property in mines and in water on the public mineral lands."

Again in *Atchison* v. *Peterson*, 20 Wall. 507 (p. 215), Mr. Justice Field said with respect to the rights of the first appropriator of water:

"And he who first connects his own labor with prop-

> erty thus situated and open to general exploration, does, in natural justice, acquire a better right to its use and enjoyment than others who have not given such labor. So the miners on the public lands throughout the Pacific States and Territories by their customs, usages and regulations everywhere recognized the inherent justice of this principle; and the principle itself was at an early period recognized by legislation and enforced by the courts in those States and Territories."

Appellant has a property right not merely in the right to broadcast but in the right to broadcast with power sufficient to reach the territory he had established and regularly served, which use measured the *quantum* of the ether thereby appropriated by him. Appellant's property right was co-extensive with his appropriation and use, as was likewise the right of western miners to the appropriation of water dependent upon the amount and the character of the diversion as appropriated by them. *Atchison* v. *Peterson* (*supra*) (p. 514):

> "The right to water by prior appropriation, thus recognized and established as the law of miners on the mineral lands of the public domain, is limited in every case, in quantity and quality, by the uses for which the appropriation is made * * *."

The principles applicable to navigable waters, that the Government may destroy or damage private property located in the beds of navigable streams, bridges or wharves over or abutting navigable streams or riparian rights on navigable streams, have no application and are not a true analogy in determining the rights of radio broadcasters to the use of the ether.

From prehistoric time navigable waters have borne ships in commerce, the earliest form of communication and trade. The right to sail the navigable bodies of water of the earth has descended to us from the very earliest of times. This right not only included the waters of the sea and inland lakes but also the rivers and water courses which were cap-

able of floating vessels in the aid of commerce, whether the soil under those waters was owned by the crown, the state or by private individuals. This right to the use of waters has been recognized by all nations and from the earliest civilization, as an inherent public right, needing no legislative sanction.

> "All navigable waters are under the control of the United States for the purpose of regulating and improving navigation, and although the title to the shore and submerged soil is in the various states and individual owners under them, it is always subject to the servitude in respect of navigation created in favor of the Federal government by the Constitution." *Gibson* v. *United States*, 166 U. S. 269 (p. 272).
>
> "Whatever the nature of the interest of a riparian owner in the submerged lands in front of his upland bordering on a public navigable water, his title is not as full and complete as his title to fast land which has no direct connection with the navigation of such water. It is a qualified title, a bare technical title, not at his absolute disposal, as is his upland, but to be held at all times subordinate to such use of the submerged lands and of the waters flowing over them as may be consistent with or demanded by the public right of navigation." *Scranton* v. *Wheeler*, 179 U. S. 141 (p. 162).
>
> "If, in the judgment of Congress, the use of the bottom of the river is proper for the purpose of placing therein structures in aid of navigation, it is not thereby taking private property for a public use, for the owner's title was in its very nature subject to that use in the interest of public navigation." *United States* v. *Chandler-Dunbar Water Power Company*, 229 U. S. 53 (p. 62).
>
> "* * * the absolute title of the riparian proprietor extends to highwater mark only, and between ordinary high and ordinary low water mark, his title to the soil is qualified, it being subject to the public rights of navigation over it, and of improvement of the stream as a highway." *Philadelphia Co.* v. *Stimson*, 223 U. S. 605 (p. 629).

Thus, when, in aid of navigation, private bridges across navigable waters are removed, oyster beds on the submerged soil under navigable waters are destroyed, or docks or other

property abutting navigable waters are rendered useless, there is no taking of property in the constitutional sense.

> "By necessary implication from the dominant right of navigation, title to submerged lands is acquired and held subject to the power of Congress to deepen the water over such lands or to use them for any structure which the interest of navigation, in its judgment, may require. The plaintiff in error has, therefore, no such private property right which, when taken, or incidentally destroyed by the dredging of a deep-water channel across it, entitles him to demand compensation as a condition." *Lewis Blue Point Oyster Cultivation Co.* v. *Briggs*, 229 U. S. 82 (p. 88).

But if Congress takes or destroys any property which is not inherently subject to the dominant right of navigation, even though such Congressional action is for the purpose of improving or aiding navigation, then the limitations of the Fifth Amendment must be observed and just compensation must be paid.

In *United States* v. *Cress*, 243 U. S. 316, this court, after stating the above principles, said, at the bottom of page 325:

> "It follows from what we have said that the servitude of privately-owned lands forming the banks and bed of a stream to the interests of navigation is a natural servitude, confined to such streams as, in their ordinary and natural condition, are navigable in fact, and confined to the natural condition of the stream. And, assuming that riparian owners upon non-navigable tributaries of navigable streams are subject to such inconveniences as may arise from the exercise of the common right of navigation, this in like manner must be limited to the natural right. The findings make it clear that the dams in question, constructed by the government in the Cumberland and Kentucky rivers, respectively, are for raising the level of those streams along certain stretches by means of backwater, so as to render them, to the extent of the raising, artificial canals instead of natural waterways. In the language of engineering, the government has "canalized" the rivers. We intimate no doubt of the power of the United States to carry out this kind of improvement. * * *"

> "But the authority to make such improvements is only a branch of the power to regulate interstate and foreign commerce, and, as already stated, this power like others, must be exercised, when private property is taken, in subordination to the 5th Amendment. *Monongahela Nav. Co.* v. *United States*, 148 U. S. 312, 336; *United States* v. *Lynah*, 188 U. S. 445, 465, 471. And we deem it clear that so much of the properties of the respective defendants in error as was unaffected by the flow of the rivers or their tributaries prior to the construction of the locks and dams in question was private property, and not subject to be overflowed, without compensation, in the raising of the level of the rivers by means of artificial dams."

See, also,

Pumpelly v. *Green Bay and Mississippi Canal Co.*, 80 U. S. 166.

United States v. *Lynah*, 188 U. S. 445.

The establishment and continuous operation of a broadcasting station prior to the enactment of the Radio Act of 1927 was an appropriation of such *quantum* of the ether as was necessary for the operation of such station on its established power and such an appropriation was the utilization of a natural phenomenon not theretofore so used or subjected to possession or utility, in the same way that waters from the streams in the Western domains were taken and diverted for the use of mining operations. Such use of the ether was not subject to any prior servitude whatsoever as have been navigable waters since time immemorial. To the contrary, the ether, whatever the nature of that phenomenon, was created as a usable, natural element for such purpose by radio broadcasting itself. The pioneer stations successively established during the years prior to 1927 virtually created the element itself by making commercially and practically possible the magic of radio broadcasting.

As each broadcasting station "came on the air," it owed the duty to prior broadcasters to find such wave length

and transmit with such power that it did not interfere with prior appropriators of the ether. In the same way, late comers among the western miners could divert waters from such streams or in such quantities only as not to affect the rights of prior users. Likewise, each such broadcasting station could require that subsequently established stations would not interfere with the broadcasting of the earlier appropriator. Apparently such rights were recognized by broadcasters generally for, so far as is reported, only one case arose in which such rights between broadcasters were involved. In *Tribune Company* v. *Oak Leaves Broadcasting Station, Inc.*, an unreported decision by Judge Francis S. Wilson of the Circuit Court of Cook County, Illinois (quoted, Congressional Record, Vol. 68, Part I, P. 216-219), the court applied the established principle of "priority of time creates a superiority in right," granting an injunction on the application of an older station restraining the interfering operation of a subsequently established radio station.

A person establishing a broadcasting station prior to the enactment of the Radio Act of 1927 acquired a property right in still another sense. The operation of such broadcasting station became a business or an occupation of its proprietor, in which he had the right to establish himself. The profits derived from the operation of appellant's station constituted his chief source of livelihood. (Cert. fol. 6.) Such business or occupation constitutes a property right in the constitutional sense, entitled to the protection of the 5th Amendment. The fact that broadcasting is a business of recent origin makes it no less an ordinary occupation and the right to follow it no less a natural right.

In *Louis K. Liggett Co.* v. *Baldridge*, 278 U. S. 105, this court declared unconstitutional a statute of the State of Pennsylvania requiring owners of drug stores to be registered pharmacists, the court saying at page 111:

> "That appellant's business is a property right (*Duplex Printing Press Co.* v. *Deering*, 254 U. S. 443, 465; *Truax*

v. *Corrigan*, 257 U. S. 312, 327), and as such entitled to protection against state legislation in contravention of the Federal Constitution, is, of course, clear. * * *

"The act under review * * * deals in terms only with *ownership*. It plainly forbids the exercise of an ordinary property right and, on its face, denies what the Constitution guarantees. A state cannot, 'under the guise of protecting the public, arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them.' *Jay Burns Baking Co.* v. *Bryan*, 264 U. S. 504, 513. See also *Meyer* v. *Nebraska*, 262 U. S. 390, 399, 400; *Norfolk & W. R. Co.* v. *Public Service Commission*, 265 U. S. 70, 74; *Pierce* v. *Society of Sisters*, 268 U. S. 510, 534, 535; *Weaver* v. *Palmer Bros. Co.*, 270 U. S. 402, 412-415; *Fairmont Creamery Co.* v. *Minnesota*, 274 U. S. 1, 9-11."

To the same effect see

Allgeyer v. *Louisiana*, 165 U. S. 578.
Lochner v. *New York City*, 198 U. S. 45.
Adair v. *United States*, 208 U. S. 161.
Dent v. *State of West Virginia*, 129 U. S. 114.
Powell v. *Pennsylvania*, 127 U. S. 678; *Smith* v. *Texas*, 233 U. S. 630.
Pennsylvania Coal Co. v. *Mahon*, 260 U. S. 393.

Prior to the enactment of the Radio Act of 1927 there was in effect "an act to regulate radio communication" approved August 13, 1912 (hereinafter referred to as the Radio Act of 1912) which, as a matter of history, was enacted as applying only to radio telegraphy. At the time that act was put in the books radio broadcasting was unknown, except as a laboratory hypothesis. Under this Act appellant had the right to commence operation of his broadcasting station and to create a property right therein. Under the express provisions of that Act a license issued thereunder was terminable only for cause or by the Government in time of war, in which event just compensation must be paid.

The issuing of licenses under the Radio Act of 1912 by the Secretary of Commerce was a mere ministerial act, and

that official had no right to refuse the issuance of a license or to revoke any license except for cause. The so-called license, therefore, which was issued under the Radio Act of 1912 amounted merely to a registration of the broadcasting station for which issued, and the refusal to issue such license would not have withheld the right to broadcast.

Thus in *Hoover* v. *Intercity Radio Co.*, 286 Fed. 1003, the Court of Appeals of the District of Columbia held that the Radio Act of 1912 gave no discretion to the Secretary of Commerce to refuse licenses to broadcasting stations applying therefor, and in *United States* v. *Zenith Radio Corporation* (D. C., N. D. Ill., E. D.) 12 Fed. (2d) 614, Judge Wilkerson held that the operation of a radio station upon a wave length other than the one assigned in the license did not subject the company so operating the station to the penalties provided by the Act.

The Attorney General of the United States finally advised the Secretary of Commerce that he had no discretion in the issuing of licenses under the Radio Act of 1912, and that this Act entitled an applicant to a license thereunder as a matter of right. In that opinion, dated July 8, 1926, (35 Op. Atty. Gen. 126), the Attorney General held that the Secretary of Commerce had no power to restrict the operation of a station with reference to frequency and power, or hours of operation, and that the Secretary was required to issue a license to an applicant for the frequency requested. See also opinion of Attorney General Wickersham, dated November 22, 1912, 29 Op. Atty. Gen. 579.

Section 11 of that Act (U. S. Code, Title 47, Section 52) provides "every such license shall be subject to the regulations contained herein and such regulations as may be established from time to time by authority of Sections 1 to 10 of this Title or subsequent acts and treaties of the United States." At the most then, a broadcasting station established or licensed under such Act was subject to *regulation*

by Congress and if such Act were applicable to radio broadcasting stations, or if Congress had the power to license radio broadcasting stations, it would have the power of regulation thereof, whether or not such right were reserved by the provisions of the Radio Act of 1912.

If that Act affected whatsoever the right to acquire a property right in broadcasting, it would seem to constitute an acquiescence on the part of the government in the establishment of the right to broadcast, such as referred to in *Atchison* v. *Peterson*, (*supra*, p. 512) or, licenses having been issued to broadcasting stations under the provisions of that Act, it estopped Congress from saying that such property rights were not acquired, which was the basis of the *Monongahela Navigation Co. case* (*infra*), as stated by this Court in *Greenleaf-Johnson Lumber Co.* v. *Garrison*, 237 U. S. 251, 265.

II.

Deprivation of the right of an established broadcasting station to continue the operation thereof with appropriate power to reach the territory it has served, is a taking of the property of such station in violation of the Fifth Amendment. The Radio Act of 1927 authorizes such action by the Federal Radio Commission, either by denying an application for renewal of the license of such station or by granting it on such terms as virtually to destroy the going business thereof, hence is invalid, because taking private property for public use.

If Congress has the power to regulate radio broadcasting, such authority is derived from its power to regulate interstate and foreign commerce. "But like the other powers granted to Congress by the Constitution, the power to regulate commerce is subject to all the limitations imposed by such instrument, and among them is that of the 5th Amend-

ment * * *." *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 336.

The reduction in power of appellant's station as ordered by the Federal Radio Commission was not merely a regulation of its broadcasting but it was virtually a prohibition thereof. "The reduction in power has caused a reduction in the area served by appellant's station to not more than one-fourth its former size with the result that appellant has lost a large proportion of his listening public and his advertising clientele." (Cert., fol. 6.)

Chief Justice Marshall defined the extent and nature of the commerce power in *Gibbons* v. *Ogden*, 9 Wheat. 1 (p. 196): "It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed."

In *Hammer* v. *Dagenhart*, 247 U. S. 251, 269, this power was further defined as "one to control the means by which commerce is carried on, which is directly the contrary of the assumed right to forbid commerce from moving and thus destroy it as to particular commodities."

In that case it was held that Congress had no power to prohibit products of child labor from moving in interstate commerce under the guise of regulation of interstate commerce. Decisions such as *Champion* v. *Ames*, 188 U. S. 321 (Lottery Tickets); *Hipolite Egg Co.* v. *United States*, 220 U. S. 45 (Pure Food); *Hoke* v. *United States*, 227 U. S. 308 (White Slave Act), and *James Clark Distilling Co.* v. *Western Maryland Ry. Co.*, 242 U. S. 311 (Intoxicating Liquors) were declared (page 270) to be based "upon the character of the particular subjects dealt with" and that (page 271):

> "In each of these instances the use of interstate transportation was necessary to the accomplishment of harmful results. In other words, although the power over interstate transportation was to regulate, that could only be accomplished by prohibiting the use of the facilities of interstate commerce to effect the evil intended."

The order of the Federal Radio Commission reducing the power of appellant's station was as effective a taking of his property as though the physical equipment thereof were actually confiscated. The order deprived appellant of the use of the physical equipment of the station for continuing the business that he had built up (Cert., fol. 6). It also prohibited the use of the extent of the ether in which he had acquired such property right and from continuing to broadcast to the radio public which his station had been serving. Deprivation of the use of property or the going business of operating such property is as effective a taking of that property as confiscation of the physical property itself.

In *United States* v. *Lynah* (*Supra*), at page 470, this court said:

> "It is clear from these authorities that where the government by the construction of a dam or other public works so floods lands belonging to an individual as to substantially destroy their value there is a taking within the scope of the 5th Amendment. While the government does not directly proceed to appropriate the title, yet it takes away the use and value; when that is done it is of little consequence in whom the fee may be vested."

Again, in *Pumpelly* v. *Green Bay Company*, 13 Wall. 166, this court said, at pages 177 and 178:

> "It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government * * * it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent; can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not taken for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an au-

> thority for invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors."

And in *United States* v. *Cress* (*Supra*), this court said, at page 328:

> "It is true that in the *Pumpelly case* there was an almost complete destruction, and in the *Lynah case* a complete destruction of the value of the lands, while in the present case the value is impaired to the extent of only one-half. But it is the character of the invasion, not the amount of damage resulting from it, so long as the damage is substantial, that determines the question whether it is a taking."

Furthermore, the effect of the order reducing the power of appellant's station is to take that property, not for public use, but for the private use of other radio broadcasting stations allowed to remain on the air and use the broadcasting facilities of the ether from which appellant was ejected. This is a violation of the "due process of law" clause of the Fifth Amendment. Ostensibly, this action was taken for the public good of the radio listening public inasmuch as the Radio Act of 1927 requires such action of the Commission to be for "public interest, convenience or necessity." Radio broadcasting is a private enterprise, presumably for the profit and gain of the individual broadcasting station, and is not a public utility. The reduction of the power of appellant's station necessarily resulted in other broadcasting stations being permitted to use appellant's property as effectively as though the transmitters and equipment of appellant's station were taken and turned over to another broadcasting station for the operation thereof. The "wireless" telegraph industry grew up under the Radio Act of 1912. Likewise, "wireless" stations are required to be licensed under the Radio Act of 1927. Would it be contended that all of the licenses of one "wireless" telegraph company could be terminated to be issued to a competitor by action of the Fed-

eral Radio Commission which it deemed to be for "public interest, convenience or necessity"? The question seems its own answer, yet such a situation differs from the instant case only in degree, not in principle.

In *Missouri Pacific Railway Co.* v. *Nebraska,* 164 U. S. 403, the right was denied of the State Board of Transportation to order the Missouri Pacific Ry. Co. to permit the erection of a grain elevator by a farmer's association on the railroad right of way, holding that the effect thereof was to take the private property of the railway company without its consent for the private use of another, resulting in the taking of property without due process of law. See also *Cole* v. *LaGrange,* 113 U. S. 1.

And in *Los Angeles Gas and Electricity Co.* v. *City of Los Angeles* (*supra*) this court said, at page 40:

> "It will be observed that we are not concerned with the duty of the corporation operating a public utility to yield uncompensated obedience to a police measure adopted for the protection of the public, but with a proposed uncompensated taking or disturbance of what belongs to one lighting system in order to make way for another. And this the 14th Amendment forbids."

The property and property rights in a radio broadcasting station established prior to the enactment of the Radio Act of 1927 may possibly be said to have been acquired with the limitation or restriction of the power of Congress to regulate whatever interstate commerce resulted from the operation of such broadcasting station. Even if that be true, such property and property rights were not acquired subject to the power of Congress, under the guise of regulation of interstate commerce, to destroy such property and property rights by prohibiting the effective operation of such broadcasting station.

The power of Congress to enact reasonable regulations to foster and promote interstate commerce, is no greater than the police power of the State to enact reasonable laws for

the promotion of public health, safety and welfare. Yet in *Pennsylvania Coal Co.* v. *Mahon,* 260 U. S. 393, this court held unconstitutional a statute of the State of Pennsylvania forbidding the mining of coal under private dwellings or streets as applied to a coal mining company that had previously acquired such rights, saying, per Mr. Justice Holmes, at page 414, 415:

> "It is our opinion that the Act cannot be sustained as an exercise of the police power * * * What makes the right to mine coal valuable is that it can be exercised with profit. To make it commercially impractical to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it. * * *
>
> "* * * The protection of private property in the 5th Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. A similar assumption is made in decisions upon the 14th Amendment. * * * When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States.
>
> "The general rule, at least, is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. * * * We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."

Decisions upholding zoning ordinances and other laws regulating the height of buildings, the intensity of building development, and otherwise restricting the use of property, are based upon the police power of states to regulate the use of property which may result in consequential damages to the property owner, but whenever such law or the exercise of police power unreasonably results in the taking of property by preventing the use thereof, such legislative action falls within the restrictions of the 5th or 14th Amendments. *Adair*

v. *United States,* 208 U. S. 161; *Lochner* v. *New York,* 198 U. S. 45; *Allgeyer* v. *State of Louisiana,* 165 U. S. 578; *Adams* v. *Tanner,* 244 U. S. 590; *Weaver* v. *Palmer Brothers Company,* 270 U. S. 402; *Truax* v. *Corrigan,* 257 U. S. 312.

The Radio Act of 1927 (Sec's. 4 (f), 11) purports to give to the Federal Radio Commission the authority to reduce the power of a station or to refuse the renewal of a license or to revoke the license of a station established prior to the passage of that Act, even though such order virtually destroys the going broadcasting business of such stations. The authority of the Commission is in the broadest possible terms—measured only by "public convenience, interest or necessity." Thus, the Commission is authorized to take the private property of an established broadcasting station for public use without just compensation. On the principles above set forth, the answer to Question 4 must be in the negative.

III.

The waivers required by the Joint Resolution of Congress of December 8, 1926, and by the Radio Act of 1927, are invalid.

The waivers required by the Joint Resolution of Congress of December 8, 1926, and by the Radio Act of 1927, are repugnant to the 5th Amendment if the effect thereof is to prevent the assertion of the property right of a broadcasting station acquired prior thereto.

The Joint Resolution of Congress of December 8, 1926, provides:

> "* * * no original radio license or the renewal of an existing license shall be granted after the date of the passage of this resolution unless the applicant therefor shall execute in writing a waiver of any right or of any claim to any right, as against the United States, to any wave length or to the use of the ether in radio transmission because of previous license to use the same or because of the use thereof."

The waiver provided by Section 5 of the Radio Act of 1927 is as follows:

> "No station license shall be granted by the commission or the Secretary of Commerce until the applicant therefor shall have signed a waiver of any claim to the use of any particular frequency or wave length or of the ether as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise."

As applied to the proprietor of a previously established broadcasting station, the waivers provided for in the Joint Resolution of December 8, 1926, and in the Radio Act of 1927, either are not to be so construed as to prevent the assertion of the property rights so acquired or the requirement for such waivers is invalid. If no property right was acquired or if Congress has the power to destroy such property rights, then the waivers would have no significance and the requirement of such waivers was wholly unnecessary and of no effect.

Likewise, if these waivers are interpreted merely as waiving the right to object to valid and constitutional *regulation* of such broadcasting stations by Congress under its power to regulate interstate commerce, then, also, such waivers were unnecessary, for such powers could be exercised by Congress irrespective of the requirement for the execution of such waivers by broadcasters.

If, however, such waivers are to be construed as preventing such broadcasters from asserting their property rights or as waiving the requirement that Congress can take such property rights only upon payment of just compensation, then the statutory requirement of such waivers, as a condition to securing a license, is unconstitutional and repugnant to the 5th Amendment.

In *Pullman Co.* v. *Kansas*, 216 U. S. 56, this court declared invalid a statute of Kansas requiring that, as a condition for the right of a foreign corporation to do a local business in

Kansas, it should pay a certain proportion of its capital as a charter fee, such requirement being held to be a burden on the company's interstate business. In approving *Western Union Telegraph Company* v. *Kansas*, 216 U. S. 1, this court stated the principle at page 63:

> "That the state could no more exact such a waiver than it could prescribe as a condition of the company's right to do local business in Kansas that it agree to waive the constitutional guaranty of the equal protection of the laws, or the guaranty against being deprived of its property otherwise than by due process of law."

In *Southern P. Co.* v. *Denton*, 146 U. S. 202, this court held invalid a Texas statute providing that the application of a foreign corporation to do business in the State should contain a stipulation that the permit should become null and void if the corporation, being sued in the State court, should remove the case into a court of the United States, the court saying, by Mr. Justice Gray:

> "But that statute, requiring the corporation, as a condition precedent to obtaining a permit to do business within the State, to surrender a right and privilege secured to it by the Constitution and laws of the United States, was unconstitutional and void, and could give no validity or effect to any agreement or action of the corporation in obedience to its provisions."

In *Home Insurance Company of New York* v. *Morse*, 20 Wall. 445, this court held unconstitutional a statute of Wisconsin providing that a foreign corporation shall not transact business within the state unless it stipulated in advance that it would not remove into the Federal courts any suit commenced against it by a citizen of Wisconsin and that an agreement of an insurance company, made in conformity to the statute, derived no support from the unconstitutional statute and was void, as it would be had no such statute been passed. The line of decisions following this case were approved in *Terral* v. *Burke Construction Company*, 257 U. S. 529, the court expressly overruling divergent decisions.

In *Frost* v. *Railroad Commission,* 271 U. S. 583, this court held that a private carrier is unconstitutionally deprived of his property without due process of law by a statute requiring him to become a public carrier in order to secure a permit to use the public highways for transportation purposes. This court said, pages 592, 593:

> "That, consistently with the due process clause of the 14th Amendment, a private carrier cannot be converted against his will into a common carrier by mere legislative command, is a rule not open to doubt and is not brought into question here. * * * The naked question which we have to determine, therefore, is whether the state may bring about the same result by imposing the unconstitutional requirement as a condition precedent to the enjoyment of a privilege, which, without so deciding, we shall assume to be within the power of the state altogether to withhold if it sees fit to do so. * * *
>
> "It would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the Federal Constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold. It is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited; and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence."

IV.

The standard of "public interest, convenience, or necessity," provided by the Radio Act of 1927 for determination by the Federal Radio Commission of its denial of licenses to pre-existing radio broadcasting stations, is so indefinite that such action by the Commission constitutes a taking of property without due process of law.

The Radio Act of 1927 (Sections 4, 11) provides for the issuance or renewal of licenses by the Federal Radio Commission if, in the judgment of the Commission, such licenses serve the "public interest, convenience or necessity." This is the only standard provided by the Act for guidance, instruction or restriction of the Commission in its actions. Such phrase has a definite, intelligent meaning when applied to public utilities and whether or not a common carrier is providing facilities in the "public interest, convenience or necessity" is a determinable fact. Radio broadcasting, however, is so new, is developing so rapidly, and is subject to such a variety of methods of operation, that it is impossible to determine which, if any, of the many varied phases of broadcasting are in "public interest, convenience or necessity." Furthermore, the Federal Radio Commission is not required, prior to a hearing on an application for a license, to define "public interest, convenience or necessity" as affects such applicant or to advise the applicant what issues it will have to meet on such hearing. In the instant case (Certificate, page 4) the appellant was advised of the hearing prior to the entry of the order in question and told, "At this hearing unless you can make an affirmative showing that public interest, convenience or necessity will be served by the granting of your application it will be finally denied." Such test is so broad and meaningless as applied to radio broadcasting that neither the appellant nor any applicant could possibly prepare for and meet any issue at such hearing. The result

is that, of necessity, any decision by the Federal Radio Commission on an application for a license must be left to the arbitrary determination of the Commission by such mental process as it deems fit to determine whether or not a license should be granted. In effect, Congress delegated legislative power to the Federal Radio Commission. Such procedure lacks the requirements of due process of law.

In *Yick Wo* v. *Hopkins,* 118 U. S. 356 (p. 370), this Court said,

> "* * * while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people * * *. And the law is the definition and limitation of power. It is, indeed, quite true, that there must always be lodged somewhere, and in some person or body, the authority of final decision * * *. But the fundamental rights to life, liberty, and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, so that, in the famous language of the Massachusetts Bill of Rights, the government of the Commonwealth 'may be a government of laws and not of men.' For, the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself."

In *Hewitt* v. *Board of Medical Examiners,* 148 Cal. 590, the Supreme Court of California declared unconstitutional a statute giving a state board the power to revoke the license of a physician for advertising by "grossly improbable statements", the Court saying,

> "The right which a person possesses under the Constitution and the laws to practice his profession as a physician and surgeon cannot be made to depend upon a provision of a statute as vague, uncertain and indefinite as is the provision we have been considering."

In *Interstate Commerce Commission* v. *Louisville and Nashville Railroad Company*, 227 U. S. 88, this Court held void an order of the Interstate Commerce Commission which was not supported by formal proof at the hearing required to sustain such order, overruling the contention that the lack of such proof might be supplied by indulging a presumption that the findings of the Commission were supported by information which it was required to obtain in performing its duties, the Court saying, at pages 90 and 93:

> "A finding without evidence is arbitrary and baseless. And if the government's contention is correct, it would mean that the Commission had a power possessed by no other officer, administrative body, or tribunal under our government. It would mean that, where rights depended upon facts, the Commission could disregard all rules of evidence, and capriciously make findings by administrative fiat. Such authority, however beneficently exercised in one case, could be injuriously exerted in another, is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercise of power.
>
> "In the comparatively few cases in which such questions have arisen it has been distinctly recognized that administrative orders, quasi judicial in character, are void if a hearing was denied; if that granted was inadequate or manifestly unfair; if the finding was contrary to the 'indisputable character of the evidence. ' * * *"
>
> "In such cases the Commissioners cannot act upon their own information, as could jurors in primitive days. All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents, and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense. In no other way can it test the sufficiency of the facts to support the finding; for otherwise, even though it appeared that the order was without evidence, the manifest deficiency could always be explained on the theory that the Commission had before it extraneous, unknown, but presumptively sufficient information to support the finding. *United States* v. *Baltimore & O. S. W. R. Co.*, 226 U. S. 14."

See also *Wichita Railroad and Light Company* v. *Public Utilities Commission*, 260 U. S. 48; *Whitfield* v. *Hanges* (C. C. A. 8th Circuit 1915), 222 Fed. 745.

Conclusion.

This case presents the application of established constitutional principles to the unique situation involved in radio broadcasting. Essentially, the question is whether a pioneer broadcaster who, at the risk of money and effort contributed to the creation of broadcasting, shall be deprived of the fruits of his accomplishments when it develops that the success of his enterprise is so great as to become clothed with a public interest. If the Radio Act of 1927 be valid it will mark a departure from previous concepts of constitutional principles. In the light of the marvelous accomplishments of mankind, it is impossible to foresee the effect of the revolutionary doctrine of that Act upon future situations which may result from man's genius. The purpose sought to be accomplished by Congress can be effected without disregarding constitutional limitations. If it be properly determined that the public good requires a limitation of pre-existing radio broadcasting stations, such result can be brought about constitutionally by paying just compensation to the stations required to relinquish their rights. Conceivably such compensation could properly be provided by license fees charged to broadcasting stations remaining on the air and benefiting from such increased broadcasting facilities. We again repeat the observation of Mr. Justice Holmes in the *Pennsylvania Coal Co. case*:

> "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."

From the foregoing we contend that the first question of the court below should be answered in the affirmative and the other four questions in the negative.

Respectfully submitted,

HENRY K. URION,
HENRY W. DRUCKER,
Solicitors for Appellant.

APPENDIX.

The Fifth Amendment to the Constitution provides:

"No person shall be * * * deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Sections 1, 4, 6, 9, 11, 12, 14, 16, 31 and 39 of the Radio Act of 1927 as amended by the Act of March 28, 1928, (U. S. C. Title 47, Sections 81-119) are as follows:

Section 1. "This chapter is intended to regulate all forms of interstate and foreign radio transmissions and communications within the United States, its Territories and possessions; to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by individuals, firms, or corporations, for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. That no person, firm, company, or corporation shall use or operate any apparatus for the transmission of energy or communications or signals by radio (a) from one place in any Territory or possession of the United States or in the District of Columbia to another place in the same Territory, possession, or District; or (b) from any State, Territory, or possession, of the United States, or from the District of Columbia to any other State, Territory, or possession of the United States; or (c) from any place in any State, Territory, or possession of the United States, or in the District of Columbia, to any place in any foreign country or to any vessel; or (d) within any state when the effects of such use extend beyond the borders of said State, or when interference is caused by such use or operation with the transmission of such energy, communications, or signals from within said State to any place beyond its borders, or from any place beyond its borders to any place within said State, or with the transmission or reception of such energy, com-

munications, or signals from and/or to places beyond the borders of said State; or (e) upon any vessel of the United States; or (f) upon any aircraft or other mobile stations within the United States, except under and in accordance with this chapter and with a license in that behalf granted under the provisions of this chapter."

Section 4. "Except as otherwise provided in this chapter, the commission, from time to time, as public convenience, interest, or necessity requires, shall—

(a) Classify radio stations;

(b) Prescribe the nature of the service to be rendered by each class of license stations and each station within any class;

(c) Assign bands of frequencies or wave lengths to the various classes of stations, and assign frequencies or wave lengths for each individual station and determine the power which each station shall use and the time during which it may operate;

(d) Determine the location of classes of stations or individual stations;

(e) Regulate the kind of apparatus to be used with respect to its external effects and the purity and sharpness of the emissions from each station and from the apparatus therein;

(f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this chapter: Provided, however, That changes in the wave lengths, authorized power, in the character of emitted signals, or in the times of operation of any station, shall not be made without the consent of the station licensee unless, in the judgment of the commission, such changes will promote public convenience or interest or will serve public necessity or the provisions of this chapter will be more fully complied with;

(g) Have authority to establish areas or zones to be served by any station;

(h) Have authority to make special regulations applicable to radio stations engaged in chain broadcasting;

(i) Have authority to make general rules and regulations requiring stations to keep such records

of programs, transmissions of energy, communications, or signals as it may deem desirable;

(j) Have authority to exclude from the requirements of any regulations in whole or in part any radio station upon railroad rolling stock, or to modify such regulations in its discretion;

(k) Have authority to hold hearings, summon witnesses, administer oaths, compel the production of books, documents, and papers and to make such investigations as may be necessary in the performance of its duties. The commission may make such expenditures (including expenditures for rent and personal services at the seat of government and elsewhere, for law books, periodicals, and books of reference, and for printing and binding) as may be necessary for the execution of the functions vested in the commission and, as from time to time may be appropriated for by Congress. All expenditures of the commission shall be allowed and paid upon the presentation of itemized vouchers therefor approved by the Chairman."

Section 6. "Radio stations belonging to and operated by the United States shall not be subject to the provisions of sections 1, 4 and 5 of this Act. All such Government stations shall use such frequencies or wave length as shall be assigned to each or to each class by the President. All such stations, except stations on board naval and other Government vessels while at sea or beyond the limits of the continental United States, when transmitting any radio communication or signal other than a communication or signal relating to Government business shall conform to such rules and regulations designed to prevent interference with other radio stations and the rights of others as the licensing authority may prescribe. Upon proclamation by the President that there exists war or a threat of war or a state of public peril or disaster or other national emergency, or in order to preserve the neutrality of the United States, the President may suspend or amend, for such time as he may see fit, the rules and regulations applicable to any or all stations within the jurisdiction of the United States as prescribed by the licensing authority, and may cause the closing of any station for radio communication and the removal therefrom of its apparatus and equipment, or he may authorize the use or control of any such

station and/or its apparatus and equipment by any department of the Government under such regulations as he may prescribe, upon just compensation to the owners. Radio stations on board vessels of the United States Shipping Board or the United States Shipping Board Merchant Fleet Corporation or the Inland and Coastwise Waterways Service shall be subject to the provisions of this Act."

Section 9. "The licensing authority, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this chapter, shall grant to any applicant therefor a station license provided for by this Chapter. * * *

"No license granted for the operation of a broadcasting station shall be for a longer term than three years and no license so granted for any other class of station shall be for a longer term than five years, and any license granted may be revoked as hereinafter provided. Upon the expiration of any license, upon application therefor, a renewal of such license may be granted from time to time for a term of not to exceed three years in the case of broadcasting licenses and not to exceed five years in the case of other licenses.

"No renewal of an existing station license shall be granted more than thirty days prior to the expiration of the original license."

Section 11. "If upon examination of any application for a station license or for the renewal or modification of a station license the licensing authority shall determine that public interest, convenience, or necessity would be served by the granting thereof, it shall authorize the issuance, renewal, or modification thereof in accordance with said finding. In the event the licensing authority upon examination of any such application does not reach such decision with respect thereto, it shall notify the applicant thereof, shall fix and give notice of a time and place for hearing thereon, and shall afford such applicant an opportunity to be heard under such rules and regulations as it may prescribe.

"Such station licenses as the licensing authority may grant shall be in such general form as it may prescribe, but each license shall contain, in addition to other provisions, a statement of the following conditions to which such license shall be subject:

(A) The station license shall not vest in the li-

censee any right to operate the station nor any right in the use of the frequencies or wave length designated in the license beyond the term thereof nor in any other manner than authorized therein.

(B) Neither the license nor the right granted thereunder shall be assigned or otherwise transferred in violation of this Act.

(C) Every license issued under this Act shall be subject in terms to the right of use or control conferred by section 6 hereof.

In cases of emergency arising during the period of one year from and after the first meeting of the commission created hereby, or on applications filed during said time for temporary changes in terms of licenses when the commission is not in session and prompt action is deemed necessary, the Secretary of Commerce shall have authority to exercise the powers and duties of the commission, except as to revocation of licenses, but all such exercise of powers shall be promptly reported to the members of the commission, and any action by the Secretary authorized under this paragraph shall continue in force and have effect only until such time as the commission shall act thereon."

Section 12. "The station license required hereby shall not be granted to, or after the granting thereof such license shall not be transferred in any manner, either voluntarily or involuntarily, to (a) any alien or the representative of any alien; (b) to any foreign government, or the representative thereof; (c) to any company, corporation, or association organized under the laws of any foreign government; (d) to any company, corporation, or association of which any officer or director is an alien, or of which more than one-fifth of the capital stock may be voted by aliens or their representatives or by a foreign government or representative thereof, or by any company, corporation, or association organized under the laws of a foreign country.

"The station license required hereby, the frequencies or wave length or lengths authorized to be used by the licensee, and the rights therein granted shall not be transferred, assigned, or in any manner, either voluntarily or involuntarily, disposed of to any person, firm, company, or corporation without the consent in writing of the licensing authority."

Section 14. "Any station license shall be revocable by the commission for false statements either in the application or in the statement of fact which may be required by section 10 hereof, or because of conditions revealed by such statements of fact as may be required from time to time which would warrant the licensing authority in refusing to grant a license on an original application, or for failure to operate substantially as set forth in the license, for violation of or failure to observe any of the restrictions and conditions of this Act, or of any regulation of the licensing authority authorized by this Act or by a treaty ratified by the United States, or whenever the Interstate Commerce Commission, or any other Federal body in the exercise of authority conferred upon it by law, shall find and shall certify to the commission that any licensee bound so to do, has failed to provide reasonable facilities for the transmission of radio communications, or that any licensee has made any unjust and unreasonable charge, or has been guilty of any discrimination, either as to charge or as to service or has made or prescribed any unjust and unreasonable classification, regulation, or practice with respect to the transmission of radio communications or service: *Provided*, That no such order of revocation shall take effect until thirty days' notice in writing thereof, stating the cause for the proposed revocation, has been given to the parties known by the commission to be interested in such license. Any person in interest aggrieved by said order may make written application to the commission at any time within said thirty days for a hearing upon such order, and upon the filing of such written application said order of revocation shall stand suspended until the conclusion of the hearing herein directed. Notice in writing of said hearing shall be given by the commission to all the parties known to it to be interested in such license twenty days prior to the time of said hearing. Said hearing shall be conducted under such rules and in such manner as the commission may prescribe. Upon the conclusion hereof the commission may affirm, modify, or revoke said orders of revocation."

Section 16. "Any applicant for a construction permit, for a station license, or for the renewal or modification of an existing station license whose application is refused by the licensing authority shall have the right to appeal from said decision to the Court of Appeals of the District of Columbia; and any licensee whose license is re-

voked by the commission shall have the right to appeal from such decision of revocation to said Court of Appeals of the District of Columbia or to the district court of the United States in which the apparatus licensed is operated, by filing with said court, within twenty days after the decision complained of is effective, notice in writing of said appeal and of the reasons therefor. * * *''

Section 31. ''The expression 'radio communication' or 'radio communications' wherever used in this Act means any intelligence, message, signal, power, pictures, or communication of any nature transferred by electrical energy from one point to another without the aid of any wire connecting the points from and at which the electrical energy is sent or received and any system by means of which such transfer of energy is effected.''

Section 39. ''* * * Nothing in this section shall be construed as authorizing any person now using or operating any apparatus for the transmission of radio energy or radio communications or signals to continue such use except under and in accordance with this Act and with a license granted in accordance with the authority hereinbefore conferred.''

Sections 1, 2, 3, 4, 5 and 6 of the Radio Act of 1912 (Act of August 13, 1912, as amended March 14, 1913, U. S. C. Title 47, Chapter 3, Sections 51-63) are as follows:

Section 1: ''A person, company or corporation within the jurisdiction of the United States shall not use or operate any apparatus for radio communication as a means of commercial intercourse among the several States, or with foreign nations, or upon any vessel of the United States engaged in interstate or foreign commerce, or for the transmission of radiograms or signals the effect of which extends beyond the jursidiction of the State or Territory in which the same are made, or where interference would be caused thereby with the receipt of messages or signals from beyond the jurisdiction of the said State or Territory, except under and in accordance with a license, revocable for cause, in that behalf granted by the Secretary of Commerce upon application therefor; but nothing in sections 1 to 10 of this Act shall be construed to apply to the transmission and exchange of radiograms or signals between points situated in the same State: Provided, That the

effect thereof shall not extend beyond the jurisdiction of the said State or interfere with the reception of radiograms or signals from beyond said jurisdiction; and a license shall not be required for the transmission or exchange of radiograms or signals by or on behalf of the Government of the United States, but every Government station on land or sea shall have special call letters designated and published in the list of radio stations of the United States by the Department of Commerce. Any person, company, or corporation that shall use or operate any apparatus for radio communication in violation of this section, or knowingly aid or abet another person, company, or corporation in so doing, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding $500, and the apparatus or device so unlawfully used and operated may be adjudged forfeited to the United States."

Section 2: "Every such license shall be in such form as the Secretary of Commerce shall determine and shall contain the restrictions, pursuant to sections 1 to 10 of this Act, on and subject to which the license is granted; every such license shall be issued only to citizens of the United States or Porto Rico or to a company incorporated under the laws of some State or Territory or of the United States or Porto Rico, and shall specify the ownership and location of the station in which said apparatus shall be used and other particulars for its identification and to enable its range to be estimated; shall state the purpose of the station, shall state the wave length or the wave lengths authorized for use by the station for the prevention of interference and the hours for which the station is licensed for work; and shall not be construed to authorize the use of any apparatus for radio communication in any other station than that specified. Every such license shall be subject to the regulations contained herein and such regulations as may be established from time to time by authority of sections 1 to 10 of this Act or subsequent Acts and treaties of the United States. Every such license shall provide that the President of the United States in time of war or public peril or disaster may cause the closing of any station for radio communication and the removal therefrom of all radio apparatus, or may authorize the use or control of any such station or

apparatus by any department of the Government, upon just compensation to the owners."

Section 3: "Every such apparatus shall at all times while in use and operation as aforesaid be in charge or under the supervision of a person or persons licensed for that purpose by the Secretary of Commerce. * * * "

Section 4: "For the purpose of preventing or minimizing interference with communication between stations in which such apparatus is operated, to facilitate radio communication, and to further the prompt receipt of distress signals, said private and commercial stations shall be subject to the regulations of this section. These regulations shall be enforced by the Secretary of Commerce through the collectors of customs and other officers of the Government as other regulations herein provided for.

"The Secretary of Commerce may, in his discretion, waive the provisions of any or all of these regulations when no interference of the character above mentioned can ensue. * * * "

"REGULATIONS

NORMAL WAVE LENGTH."

"* * * *

"DISTANCE REQUIREMENT FOR DISTRESS SIGNALS."

"* * * *

"PENALTIES."

"* * * *

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No. 29

In the Supreme Court of the United States

OCTOBER TERM, 1930

CLINTON R. WHITE

v.

GEORGE E. Q. JOHNSON AND H. D. HAYES

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE APPELLEES BELOW

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	1
Constitutional provision and statutes involved	3
Statement	4
Summary of argument	10
Argument:	
I. Appellant's operation of his broadcasting station prior to the enactment of the Radio Act of 1927 did not give him a "property" right to be thereafter free from any exercise of the regulatory power of Congress over interstate commerce	13
II. Restriction of the power of appellant's station in order to carry out the regulatory provisions of the Radio Act of 1927 was not a "taking" of private property for the public use within the meaning of the fifth amendment	31
III. The Radio Act of 1927 is not wanting in due process because of indefiniteness in the statutory standard of public interest, convenience, or necessity or because the act did not require the commission further to define the issues in advance of a hearing before it	46
IV. If appellant's property was taken for the public use contrary to the fifth amendment, aside from the waivers which he signed, the Government does not contend that these waivers rendered the taking valid	51
Conclusion	52
Appendix	53

CITATIONS

Cases:	
Armstrong v. *DeForest Tel. & Tel. Co.* 280 Fed. 584	28
Atlantic Coast Line v. *Goldsboro*, 232 U. S. 548	34
Booth v. *Illinois*, 184 U. S. 425	35
C. B. & Q. Railway Co. v. *Drainage Commissioners*, 200 U. S. 561	34
C. G. E. Co., Ltd., v. *Fada Radio, Ltd.* [Privy Council] 1930, A. C. 97	28
Chicago Federation of Labor v. *Federal Radio Commission*, 41 F. (2d) 422	45-46
City of New York v. *Federal Radio Commission*, 36 F (2d) 115	46

25942—30——1

Cases—Continued.

	Page
Colorado v. *United States*, 271 U. S. 153	49
Consolidated Rendering Co. v. *Vermont*, 207 U. S. 541	51
Dent v. *West Virginia*, 129 U. S. 114	35
General Electric Co. v. *Federal Radio Commission*, 31 F. (2d) 630	46
Gibson v. *United States*, 166 U. S. 269	19–20
Great Lakes Broadcasting Co. v. *Federal Radio Commission*, 37 F. (2d) 993	46
Hammer v. *Dagenhart*, 247 U. S. 251	33
Hamilton v. *Kentucky Distilleries Co.*, 251 U. S. 146	23
Hazeltine Corp. v. *Electric Service Engineering Corp.*, 18 F. (2d) 662	28, 29
Hoover v. *Intercity Radio Co.*, 286 Fed. 1003	15
International Textbook Co. v. *Pigg*, 217 U. S. 91	14
Lewis Blue Point Oyster Co. v. *Briggs*, 229 U. S. 82	19
Liggett Co. v. *Baldridge*, 278 U. S. 107	36
Louisville Bridge Co. v. *United States*, 242 U. S. 409	20
Los Angeles v. *Los Angeles Gas & Electric Corp.*, 251 U. S. 32	22, 23
McLain v. *Public Utilities Commission*, 110 Oh. St. 1	50
Mahler v. *Eby*, 264 U. S. 32	49
Mitchell v. *United States*, 267 U. S. 341	33
Monongahela Navigation Co. v. *United States*, 148 U. S. 312	32
Morris v. *Duby*, 274 U. S. 135	33
Murphy v. *California*, 225 U. S. 623	35
Mutual Film Corp. v. *Ohio Industrial Commission*, 236 U. S. 230	13, 48–49
Noble State Bank v. *Haskell*, 219 U. S. 104	36
Olser v. *Smith*, 195 U. S. 332	35
O'Reilly v. *Morse*, 15 How. 62	25
Otis v. *Parker*, 187 U. S. 606	35
Penna. Coal Co. v. *Mahon* 260 U. S. 393	36, 45
Pensacola Telegraph Co. v. *Western Union Telegraph Co.*, 96 U. S. 1	14
Powell v. *Pennsylvania*, 127 U. S. 678	35
Pumpelly v. *Green Bay Co.*, 13 Wall. 166	21
Radio Corporation of America v. *E. J. Edmond & Co.*, 20 F. (2d) 929	27, 28
Radio Corporation of America v. *Splitdorf Electrical Co.*, 14 F. (2d) 643	27, 28
Rast v. *Van Deman & Lewis Co.*, 240 U. S. 342	35
Red Star Transportation Co. v. *Red Dot Coach Lines*, 220 Ky. 424	50
Reinman v. *Little Rock*, 237 U. S. 171	35
Scranton v. *Wheeler*, 179 U. S. 141	19–20
Slaughter-House Cases, 16 Wall. 36	35
Tagg Brothers v. *United States*, 280 U. S. 420	17

Cases—Continued. Page
Technical Radio Laboratory v. *Federal Radio Commission*, 36 F. (2d) 111 ..... 14, 46
Tribune Company v. *Oak Leaves Broadcasting Station*, Cir. Ct., Cook County, Ill., unreported 22
Union Bridge Co. v. *United States*, 204 U. S. 364 20
United States v. *American Bond and Mortgage Co.*, 31 F. (2d) 448 ..... 14, 26, 44
United States v. *Chandler-Dunbar Co.*, 229 U. S. 53 20
United States v. *Cress*, 243 U. S. 316 21
United States v. *Delaware & Hudson Co.*, 213 U. S. 366 ..... 10, 16
United States v. *Lynah*, 188 U. S. 445 21
United States v. *Sing Tuck*, 194 U. S. 161 51
United States v. *Zenith Radio Corp.*, 12 F. (2d) 614 15
Wabash C. & W. R. R. Co. v. *Commerce Commission*, 309 Ill. 412 50
Western Union Telegraph Co. v. *Pendleton*, 122 U. S. 347 14
Wisconsin R. R. Comm. v. *C., B. & Q. R. R.*, 257 U. S. 563 14
Zahn v. *Bd of Public Works*, 274 U. S. 325 36
Constitution and statutes:
Fifth amendment 53
Radio act of 1927, c. 169, 44 Stat. 1162 (U. S. C., Sup. III, title 47, sec. 81, *et seq.*)—
Sec. 1 53
Sec. 2 54
Sec. 3 54
Sec. 4 55
Sec. 5 56
Sec. 9 56
Sec. 10 57
Sec. 11 58
Sec. 16 59
Sec. 21 60
Sec. 31 61
Sec. 32 62
Sec. 33 62
Sec. 40 62
Sec. 41 63
Act of March 28, 1928, c. 263, Secs. 1 and 5, 45 Stat. 373 (U. S. C., Sup. III, title 47, sec. 89) 63–64
Joint resolution of Congress of December 8, 1926, c. 1, 44 Stat. 917 64–65
Miscellaneous:
Annual report, Federal Radio Commission, for fiscal year ended June 30, 1927 30–31
Annual report, Federal Radio Commission, for fiscal year ended June 30, 1928 ..... 26, 50

Miscellaneous—Continued. Page
Third annual report, Federal Radio Commission 43
Congressional Record—
Vol. 67, pt. 5, p. 5478 38
Vol. 67, pt. 5, p. 5479 39
Vol. 67, pt. 5, p. 5480 39
Vol. 67, pt. 5, p. 5647 18
Vol. 67, pt. 11, p. 12618 18
Vol. 68, pt. 1, p. 32 37
Vol. 68, pt. 1, p. 216 22
Hearings of House Merchant Marine and Fisheries Committee on H. R. 15430, Seventieth Congress, second session, pp. 539–580 44
Report of fifty-second annual meeting American Bar Association 29, 40, 44
35 Ops. A. G. 126 ..... 15, 40

In the Supreme Court of the United States

OCTOBER TERM, 1930

No. 29

CLINTON R. WHITE

v.

GEORGE E. Q. JOHNSON AND H. D. HAYES

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE APPELLEES BELOW

OPINION BELOW

The opinion of the United States District Court for the Northern District of Illinois is reported in 29 F. (2d) 113.

JURISDICTION

The case is here on certificate under Section 239 of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

The Circuit Court of Appeals certified the following questions:

> 1. Did a person who, prior to the enactment of the Radio Act of 1927, applied for

and was granted successive licenses by the Secretary of Commerce for the operation of a broadcasting station, and who owned and continuously operated such broadcasting station, whereby it developed a following of listeners and advertisers which constituted a going business, have or acquire thereby property in the continued operation of such station, with power appropriate to continue the operation of said business, within the meaning of the word "property" as used in the Fifth Amendment to the Constitution of the United States?

If the answer to this question be in the affirmative, the Circuit Court of Appeals asked:

2. Is the Joint Resolution of Congress of December 8th, 1926, valid as against the claim that by virtue of the waiver it requires it works a deprivation of such property without due process of law or a taking of private property for public use without just compensation?

3. Is the Radio Act of 1927, as amended, valid as against the claim that, by virtue of the waiver required in the last paragraph of Section 5 and by virtue of the condition required to be contained in all licenses by subparagraph (A) of Section 11, it works a deprivation of such property without due process of law or a taking of private property for public use without just compensation?

4. Is the Radio Act of 1927, as amended, valid as against the claim that it authorizes

or requires the Federal Radio Commission, in its action on an application for renewal of license by a person such as is described in Question 1, to take private property for public use without just compensation, either by denying such application or by granting it on such terms as virtually to destroy a going broadcasting business of such person?

5. Is the Radio Act of 1927, as amended, valid as against the claim that it authorizes or requires the Federal Radio Commission, in acting upon an application for renewal of license by said person, to deprive such person of such property without due process of law, in that the only standards provided by the Act for the guidance of the Commission in acting upon such applications are that of "public interest, convenience or necessity" and that set forth in Section 5 of the Amendatory Act of March 28, 1928, and in that the Act fails to require that the Commission, prior to proceeding to a hearing or decision on such application, shall specify in what respect it deems or has failed to find that the granting of such application would not serve public interest, convenience or necessity?

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The relevant portion of the Constitution and of the statutes are set forth in the appendix, pp. 53–65, *infra*.

STATEMENT

Clinton R. White (hereinafter called the appellant) brought this action in the United States District Court for the Northern District of Illinois to restrain the United States Attorney for that district and the local Supervisor of Radio, Department of Commerce, from enforcing against him the penal provisions of Sections 32 and 33 of the Radio Act of 1927, c. 169, 44 Stat. 1162, 1173, either for violation of the provisions of that Act or for violation of an order of the Federal Radio Commission dated August 22, 1928. Appellant appealed from the order entered by the District Court denying his application for an injunction *pendente lite*.

Since August 15, 1926, appellant has continuously owned and operated a radio station in the City of Chicago, Illinois, of the type and character commonly known as a broadcasting station, under the call letters WCRW. Appellant has had successive licenses, first, from the Secretary of Commerce under the Act to Regulate Radio Communication of August 13, 1912, c. 287, 37 Stat. 302, and, after the enactment on February 23, 1927, of the Radio Act of 1927, from the Federal Radio Commission.

Appellant's first license from the Secretary of Commerce was issued August 15, 1926, as a result of an application in which appellant designated the normal sending wave length of his station as 720 kc. The license covered a period of three months and, on its expiration, was succeeded by a succes-

sion of licenses similar in form and duration, each issued by the Secretary of Commerce on the application of appellant, until the termination of the Secretary's authority by the Radio Act of 1927. From August 15, 1926, until April 26, 1927, appellant operated a station with the power of 1,000 watts.

The first license issued to appellant by the Federal Radio Commission was dated April 26, 1927, and authorized him to operate his station on 760 kc. with 500 watts. The next license was dated June 15, 1927, and authorized appellant to operate a station on 1,340 kc. with 500 watts. All licenses thereafter until September 1, 1928, authorized appellant to operate on 1,340 kc. with 500 watts. The licenses issued to appellant by the Commission were for varying periods, but never in excess of three months. Under all licenses issued by the Commission appellant has had to divide time with two other stations.

Since September 1, 1928, as the result of an order of the Commission dated August 22, 1928, appellant has been authorized to operate his station with only 100 watts power, as compared with 500 watts previously authorized by the Commission. This order, which led to the filing of appellant's bill of complaint, was preceded by the following proceedings:

On January 12, 1928, appellant filed an application for a renewal of the license then held by him. That license, which originally covered a period of sixty days beginning November 1, 1927, was ex-

tended from time to time so that it finally expired on September 1, 1928. In the meantime, the Commission on May 25, 1928, entered an order known as General Order 32 in which the Commission, after reciting that it had examined appellant's application for renewal of his license, together with similar applications on the part of 163 other broadcasting stations, and that it was not satisfied that public interest, convenience, or necessity would be served by granting any of such applications, fixed July 9, 1928, in its offices at Washington, D. C., as the time and place for a hearing on each of such applications. The Commission notified appellant of the order by mailing him a copy accompanied by a letter stating, among other things:

> At this hearing unless you can make an affirmative showing that public interest, convenience or necessity will be served by the granting of your application, it will be finally denied.

Similar letters accompanied by copies of the order were sent to the 163 other broadcasting stations covered by the order.

On July 9, 1928, appellant appeared before the Commission by counsel, as did a large proportion of the other broadcasting stations included in the order, and hearings on the applications of said stations were set at various times during the following two weeks. The hearing on appellant's application for a renewal was held partly on July 16, 1928, and partly on July 23, 1928.

On August 22, 1928, the Commission took action with reference to appellant's application by entering the following order:

> The Commission having considered the evidence and the arguments presented to it in the above-entitled case, heretofore heard and taken under advisement, and having found that public interest, convenience or necessity would not be served by granting said application unless the power heretofore used by the applicant be reduced to 100 watts, and then only subject to such changes in authorized frequency, power, and hours of operation as the Commission may in the future find to be in the public interest, convenience or necessity, or necessary in order to comply with the provisions of Section 5 of the Radio Act of 1928, and further subject to such extension or extensions of the applicant's existing license, thus modified with respect to authorized power, as the Commission may hereafter order.
>
> IT IS ORDERED that, pending the issuance of a renewal of said license in accordance with said findings, the existing license of said applicant be, and the same is hereby, modified by reducing the power authorized therein to 100 watts; this order to be effective on September 1, 1928, at the hour of 3 o'clock A. M., Eastern Standard Time.
>
> IT IS FURTHER ORDERED that said existing license, thus modified, be, and the same is hereby, further extended for a period of thirty (30) days to terminate at 3 o'clock

a. m. Eastern Standard Time, October 1, 1928.

Appellant received a copy of this order on or about August 24, 1928, and filed his bill of complaint on September 12, 1928.

The approximate value of the physical equipment constituting appellant's station is $5,000.00. Up to the time of filing his bill of complaint appellant had expended approximately $16,472.89 in the operation of the station. The gross revenues derived by appellant from the station, consisting of payments by advertisers for the broadcasting of advertising material from the station, amounted to $160.00 in 1926 (4½ months), $7,433.45 in 1927, and $8,925.87 in 1928 (7 months). It does not appear that on or prior to February 23, 1927, appellant's station was operating at a profit and presumably it was not. At the time of filing the bill of complaint and for some time prior thereto, however, appellant's net profits from the station were about $400.00 a week. Appellant is dependent upon this income as his chief source of livelihood.

The physical equipment constituting appellant's station is so designed that it will not operate efficiently or satisfactorily with power as low as 100 watts. To broadcast efficiently and satisfactorily with 100 watts appellant will have to replace a very substantial portion of his present apparatus with new and different apparatus. The reduction in power has caused a reduction in the area served by

appellant's station to not more than one-fourth its former size with the result that appellant has lost a large proportion of his listening public and his advertising clientele.

On February 10, 1927, in compliance with the Joint Resolution of Congress, approved December 8, 1926, c. 1, 44 Stat. 917, *infra*, p. 64, and as part of an application for licenses attached thereto, appellant executed and filed with the Secretary of Commerce a statement as follows:

> The applicant hereby waives any right or any claim of right, as against the United States, to any wave-length, or to the use of the ether in radio transmission, because of previous license to use the same or because of the use thereof.

After the establishment of the Federal Radio Commission, each of the successive licenses issued by the Commission to appellant was preceded by a written application executed, sworn to, and filed by appellant containing the following statement:

> The applicant waives any claim to the use of any particular frequency or wave length or of the ether as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise, and requests a radio station license in accordance with this application.

Each license issued by the Commission to appellant contained the following condition:

> This station license shall not vest in the licensee any right to operate the station nor

any right in the use of the frequencies or wave-length designated in the license beyond the term thereof nor in any other manner than authorized therein.

SUMMARY OF ARGUMENT

I. The broadcasting of appellant's station transmits ideas and intelligence across State lines and it may interfere with the interstate radio transmission of other stations. Its operations, therefore, fall within the power conferred upon Congress to regulate interstate commerce.

Prior to the enactment of the Radio Act of 1927 Congress had not undertaken general regulation of radio stations. Appellant operated his broadcasting station at this time with a power of 500 watts, but such operation did not create a property right, protected by the Fifth Amendment, to operate his station thereafter with the same power free from Congressional regulation. One who engages in interstate commerce does so subject to the plenary control of Congress over interstate commerce. *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366, 405–406, 416. The constitutional power of Congress imposes a servitude on property directly connected with a medium of interstate commerce. This is illustrated by the decisions holding that an injury to riparian property caused by an improvement to navigation is not a taking of property requiring compensation.

The doctrine of prior appropriation upon which appellant relies is limited in its application

to the determination of superior right between private claimants. It has never been recognized as conferring a prescriptive right against an exercise of government power. It can have no application to broadcasting, because the ether, whatever its unknown physical properties may be, can not be appropriated, possessed, owned, or controlled. Even the courts are powerless to protect appellant's asserted right to exclude others from its use. Foreign stations may invade with impunity his alleged right to broadcast without interference on the wave length he employs. It seems a contradiction in terms to recognize such a right when nothing is physically appropriated and no legal rights may be adequately secured or enforced. In effect appellant is claiming a monopoly in the use of a scientific principle. No such right would be granted to the first inventor under our patent laws, and there is less reason for its recognition in this case. The uncertainty of relative rights and obligations alleged to arise from the appellant's asserted appropriation of the ether lead to the conclusion that no property rights in its use may be predicated thereon.

II. Restriction of the power of appellant's station was only incidental to a legitimate exercise of governmental powers, and it was therefore not a taking of property for the public use. When statutory provisions have a reasonable relation to the exertion of some constitutional power, the legisla-

ture may, without providing compensation, compel the discontinuance of a business, restrict the number of those engaged in a business or profession, or otherwise impose burdens upon property or on those engaged in business.

The authority given the Federal Radio Commission by the Radio Act of 1927 to determine what power a broadcasting station may use bears a reasonable relation to regulation in the public interest of radio transmission and broadcasting, first, because the number of broadcasting stations which can efficiently operate is limited and, secondly, because control over the power used by broadcasting stations is necessary to cope with the complex problem of interference between stations. The necessity for a regulatory body exercising such authority is evidenced by the fact that, prior to the enactment of the Radio Act of 1927, the excessive number of broadcasting stations and the unscientific distribution among them of frequency, power, hours of operation and location were rapidly destroying the effectiveness of all broadcasting.

III. The standard fixed by the Radio Act of 1927 for the guidance of the Federal Radio Commission in passing upon applications for station licenses is public interest, convenience, or necessity. This standard is given precision by other provisions of the Act fixing the principles to govern the Commission in granting licenses. The statutory standard is at least as definite as others which this Court has sustained and which were attacked on the

ground that they permitted arbitrary action by the enforcing body in violation of due process. See *Mutual Film Corp.* v. *Ohio Industrial Commission*, 236 U. S. 230, 245–246. It is a standard frequently found in regulatory statutes.

Section 16 of the Radio Act of 1927 permits an administrative review of any order of the Federal Radio Commission denying an application for a license and the statutory provisions governing the hearing on appeal satisfy the strictest requirements of due process. Since appellant did not so appeal, he can not assert the insufficiency of the hearing given him by the Commission.

Accordingly the first question certified should be answered in the negative. If it be answered in the affirmative, the fourth and fifth questions certified should be answered in the negative. It is conceded that the waivers referred to in the second and third questions would not impart validity to an otherwise unconstitutional taking of appellant's property.

ARGUMENT

I

APPELLANT'S OPERATION OF HIS BROADCASTING STATION PRIOR TO THE ENACTMENT OF THE RADIO ACT OF 1927 DID NOT GIVE HIM A "PROPERTY" RIGHT TO BE THEREAFTER FREE FROM ANY EXERCISE OF THE REGULATORY POWER OF CONGRESS OVER INTERSTATE COMMERCE

Interstate radio transmission is interstate commerce and therefore within the regulatory powers of Congress under the commerce clause. This

Court has frequently held that the communication of ideas and intelligence across State lines is interstate commerce. *Pensacola Telegraph Co.* v. *Western Union Telegraph Co.*, 96 U. S. 1, 9; *International Textbook Co.* v. *Pigg*, 217 U. S. 91, 106, 107; *Western Union Telegraph Co.* v. *Pendleton*, 122 U. S. 347, 356. Since Congress may act to remove any burden on interstate commerce imposed by intrastate commerce (*Wisconsin R. R. Comm.* v. *C. B. & Q. R. R. Co.*, 257 U. S. 563), it can regulate even intrastate radio transmission to prevent interference with interstate transmission.

Appellant's station, whether using 100 or 500 watts power, falls within the scope of this regulatory power. Under average conditions during evening hours a station with 100 watts power has a radius of nuisance area of 450 miles; that is, it will within that area prevent radio listeners from obtaining proper reception of any other broadcasting station using the same wave length or frequency; for a station of 500 watts the radius of nuisance area is 900 miles. *United States* v. *American Bond and Mortgage Co.* (D. C., N. D. Ill.), 31 F. (2d) 448, 453. The broadcasting service of a station with only 15 watts power "can not be exclusively intrastate." *Technical Radio Laboratory* v. *Federal Radio Commission* (Ct. App. D. C.), 36 F. (2d) 111, 113.

Prior to the enactment of the Radio Act of 1927, Congress had not adopted any comprehensive statute regulating radio transmission. Although the

Radio Communication Act of August 13, 1912, required every operator of a radio transmitter to obtain a license from the Secretary of Commerce, the latter had no discretionary power to refuse or withhold licenses. *Hoover* v. *Intercity Radio Co.* (Ct. App. D. C.) 286 Fed. 1003. The licenses which the Secretary of Commerce issued designated the power and the frequency to be used by the licensee, but these designations were not authorized by the Act and were not binding on the licensee. *United States* v. *Zenith Radio Corp.* (D. C. N. D. Ill.), 12 F. (2d) 614; 35 Ops. A. G. 126. The Act imposed certain prohibitions designed chiefly for the protection of distress calls from ships and of Government stations, but in its licensing provisions it was, in effect, a mere registration act.

Appellant's contention is that because he engaged in radio broadcasting before Congress had legislated to regulate the power of broadcasting stations, he thereby obtained a property right, protected by the Fifth Amendment, to be free from any future exercise of national authority which would restrict the power of his station.

We submit that the contention is both novel and startling. If sound, it would seem that every person whose business is restricted by new legislation regulating interstate commerce may assert a property right to immunity which, when infringed under authority of the legislature, will constitute a taking of property for the public use for which compensation must be paid.

In *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366, *supra*, this Court in upholding the validity of the Commodities Clause of the Hepburn Act of June 29, 1906, c. 3591, 34 Stat. 584, rejected a similar contention. That Act made it unlawful for a railroad to transport in interstate commerce any article owned by it or in which it might have an interest. The clause was attacked under the Fifth Amendment on the ground that it would destroy "rights of property which the corporations possessed and had long enjoyed under the sanction of valid state laws." (P. 400.) It appeared that one of the defendant corporations had been created by the legislature of Pennsylvania seventy-five years earlier for the express purpose of developing its coal lands and for transporting that coal, and it also appeared that the defendant companies had, pursuant to this general policy of the State of Pennsylvania, made investments in coal lands and mines and in stock of coal-producing companies. (P. 402.) The Court said (p. 416) that the Act was "a regulation which Congress had the power to adopt and to which all preexisting rights of the railroad companies were subordinated." It also said (pp. 405–406):

> Let it be conceded at once that the power to regulate commerce possessed by Congress is in the nature of things ever enduring, and therefore the right to exert it to-day, to-morrow, and at all times in its plenitude must remain free from restrictions and lim-

> itations arising or asserted to arise by state laws, whether enacted before or after Congress has chosen to exert and apply its lawful power to regulate.

Appellant's assertion of a vested right to be free from restrictions imposed by Federal regulation of interstate commerce has, we submit, less support than did the contention of the railroads whose business of mining and carrying coal, expressly sanctioned by the State, was prohibited by the Hepburn Act.

Regulation of interstate commerce is not invalid because it diminishes or even destroys the profits or business of some of those affected. *Tagg Brothers* v. *United States,* 280 U. S. 420, held that the Secretary of Agriculture could fix the maximum charges of commission men operating on a public stockyard. Presumably some commission men could not continue in business on the lower scale of charges prescribed by the Secretary of Agriculture and appellants in that case so contended (pp. 434–435). Yet the unrestrained fixing of their own charges by the commission men prior to the enactment of the Packers and Stockyards Act did not give them a right, protected by the Fifth Amendment, to be free from regulation under the commerce clause, even though that regulation directly curtailed the amount which they would receive for their services, and accordingly the profits derived from engaging in this business.

In the instant case appellant's assertion of a prescriptive right as against the regulatory powers of

Congress is peculiarly untenable because the Radio Communication Act of 1912 contained a caveat warning every licensee that he was entering a field in which further regulation was to be expected. Section 2 of the Act provided that every license granted thereunder should be subject to—

> such regulations as may be established from time to time by authority of sections 1 to 10 of this Act or subsequent Acts and treaties of the United States.

In addition, appellant obtained his first license on August 15, 1926. Prior to that time both the House and the Senate had passed a bill containing all the essential licensing requirements later embodied in the Radio Act of 1927.[1]

That one who engages in interstate commerce does so subject to the regulatory powers of Congress, and therefore obtains no property right to be free from an exercise of these powers, is supported by the decisions of this Court holding that owners of land under and bordering navigable waters take the same subject to the power of Congress to improve navigation. By reason of this servitude such an owner can assert, as against duly authorized acts of the Government for the improvement of navigation, no property right to maintain the status of his land unchanged, or, to state the decisions in another way, an injury thereby result-

[1] H. R. 9971, 69th Cong., passed the House March 15, 1926 (Cong. Rec., Vol. 67, Pt. 5, p. 5647); amended and passed Senate July 2, 1926 (Cong. Rec., Vol. 67, Pt. 11, p. 12618).

ing is only incidental to the legitimate exercise of governmental powers for the public good and no property for which just compensation must be paid is taken.

The foregoing doctrine applies even when the source of title antedated the Constitution. *Lewis Blue Point Oyster Co.* v. *Briggs,* 229 U. S. 82, held that although the deepening of a channel might destroy oyster beds held under titles derived from royal grants made in colonial times, no private property would be thereby taken without just compensation, contrary to the Fifth Amendment. The Court said (p. 88):

> By necessary implication from the dominant right of navigation, title to such submerged lands is acquired and held subject to the power of Congress to deepen the water over such lands or to use them for any structure which the interest of navigation, in its judgment, may require. The plaintiff in error has, therefore, no such private property right which, when taken, or incidentally destroyed by the dredging of a deep water channel across it, entitles him to demand compensation as a condition.

There is no taking of property requiring the payment of just compensation when governmental agencies engaged in improving navigation under authority delegated by Congress destroy a riparian owner's right of access to navigable waters (*Gibson* v. *United States,* 166 U. S. 269; *Scranton* v.

Wheeler, 179 U. S. 141); require an owner to remove at his own expense a bridge which, when erected, did not obstruct navigation and which was constructed under the authority of a State charter (*Union Bridge Co.* v. *United States*, 204 U. S. 364) or under authority of prior Acts of Congress containing no reservation of the right to alter, amend, or revoke the franchise (*Louisville Bridge Co.* v. *United States*, 242 U. S. 409); or destroy the water power of a riparian owner which he or his predecessors had been developing for many years (*United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 71, 74).

In *Gibson* v. *United States*, *supra*, the Court said (pp. 271–272):

> All navigable waters are under the control of the United States for the purpose of regulating and improving navigation, and although the title to the shore and submerged soil is in the various States and individual owners under them, it is always subject to the servitude in respect of navigation created in favor of the Federal government by the Constitution.

In *United States* v. *Chandler-Dunbar Co.*, *supra*, the Court said of the title of the riparian owner (p. 62):

> It is subordinate to the public right of navigation, and however helpful in protecting the owner against the acts of third parties, is of no avail against the exercise of the

great and absolute power of Congress over the improvement of navigable rivers.

United States v. *Cress*, 243 U. S. 316, and *United States* v. *Lynah*, 188 U. S. 445, cited by appellant, hold that the servitude imposed on the riparian owner by virtue of the constitutional powers of Congress is limited to the river in its natural state. A property right is therefore invaded when the backwater from a Government dam floods the owner's land or prevents him from using the water power of a nonnavigable tributary stream the bed of which he owns (*United States* v. *Cress, supra,* pp. 329–330), and under the Fifth Amendment this invasion of private property must be compensated. These decisions defining the extent of the servitude imposed by the Constitution on the owner of riparian lands seem to lend no support to the contention that engaging in interstate commerce before Congress has acted gives rise to a property right to be free, except on payment of compensation, from a valid exercise of regulatory power. *Pumpelly* v. *Green Bay Co.*, 13 Wall. 166, cited by appellant, is a similar case holding that when a dam constructed under the authority of the State of Wisconsin brought about the flooding of the plaintiff's land, there was, under the constitution of the State of Wisconsin, a taking of property for public use requiring the payment of just compensation.

Appellant also urges that the doctrine of prior appropriation of water rights in nonnavigable

streams of the western States indicates that the operations of his broadcasting station would give him by appropriation a property right to use a part of the ether. This doctrine of prior appropriation might have weight were the conflict simply between two radio stations, apart from any Congressional regulation. Clearly it has no application where a prescriptive right as against the constitutional power of Congress is asserted. In the unreported case of *Tribune Company* v. *Oak Leaves Broadcasting Station* (Cir. Ct., Cook County, Ill.), the only decision applying the doctrine of prior appropriation to a radio station, the court said (Cong. Rec., Vol. 68, Pt. 1, p. 216, 218):

> This court is of the opinion, from its interpretation of the act of August 13, 1912, that Congress did not intend to undertake to assume the right to regulate broadcasting under its powers given it to regulate commerce and that, *until such time as it does*, litigants may enforce such rights as they may have by reason of operating broadcasting stations in the State courts having jurisdiction of the person of the parties. (Italics ours.)

Los Angeles v. *Los Angeles Gas & Electric Corp.*, 251 U. S. 32, upon which appellant relies, does not hold that prior use and occupancy create rights which may be asserted as against a proper exercise of governmental power. A franchise granted by the City of Los Angeles authorized the electric

company to erect poles and wires in the city streets. Subsequently the city adopted an ordinance authorizing the construction of a municipal electric-lighting system and this ordinance required the removal or relocation without compensation of the fixtures of the electric company to make place for those of the city's system. This Court in affirming a decree protecting the company's rights accepted (pp. 38–39) the view of the lower court that the city had acted "not in its governmental capacity—an exertion of the police power—but in its 'proprietary or quasi-private capacity.'" This Court specifically stated (p. 40) that the case did not concern the duty of a corporation operating a public utility "to yield uncompensated obedience to a police measure adopted for the protection of the public." Since the powers conferred upon Congress by the Constitution are no more restricted by the Fifth Amendment than are the police powers of the States by the Fourteenth Amendment (*Hamilton* v. *Kentucky Distilleries Co.*, 251 U. S. 146, 156–157), it may be said, paraphrasing the last quotation, that the case now before the Court is one that concerns the duty of appellant to yield uncompensated obedience to a regulation of interstate commerce adopted for the protection of the public.

A further ground for distinguishing the *Los Angeles Gas & Electric case, supra*, is that the rights there asserted rested upon an express grant. Ap-

pellant's alleged rights do not rest upon any governmental grant. The licenses issued to him by the Secretary of Commerce under the Radio Communication Act of 1912 were limited to three months periods and, in addition, that Act was, with respect to the issuance of licenses, a mere registration act. (*Supra,* pp. 4, 15.)

Apart from the consideration that the doctrine of prior appropriation has no application to an assertion of prescriptive immunity from governmental regulation, we submit that this doctrine may not properly be extended by analogy to radio broadcasting.

Whatever its unknown physical properties may be, the ether is not susceptible of ownership. It can not be reduced to possession or otherwise controlled. Appellant's assertion of a property right resting upon prior appropriation therefore comes to this: That he, and he alone, may transmit radio signals of a chosen wave length, and all other stations whose operations interfere with the reception of his signals must be silenced. This is at once a negation of power to regulate his operations and an assertion of power to regulate the activities of everyone else, for it is clear that he himself can not by his so-called "appropriation" exclude others from interference. Nor can the courts adequately perfect his asserted right. A high-powered Canadian station may with impunity, so far as our courts are concerned, interfere with the broadcasting of

a United States station earlier in the field. Indeed, it seems a contradiction in terms to speak of a property right acquired by appropriation where nothing is appropriated and no legal rights can be adequately secured or enforced.

Appellant's claim to a monopoly in the use of a chosen wave length is not predicated upon any right to use patented devices or to exclude others from their use. It goes far beyond any such right and seeks to exclude others from the use of natural forces, not clearly understood by scientists, and to monopolize a measurable portion of the ether, which in its relation to the art of radio communication is nothing more than a theoretical conception or explanation of the operations of certain principles of science. Such a monopoly is unheard of in the patent law (*O'Reilly* v. *Morse,* 15 How. 62, 112), and there is less reason for its recognition in this case.

The water taken from a stream or lake can be measured; the location of electric light poles in a city street is definite and fixed; prior use of a trade name or trademark can be ascertained. But the doctrine that by prior appropriation a broadcasting station can attain the exclusive use of a measurable portion of the ether raises scientific and practical questions of the greatest complexity. Frequency, power, different kinds of interference between stations, service area and nuisance area, location of stations and times of operation are all

separate but related questions. Furthermore, interference is dependent upon the selectivity of the receiving instrument, that is, its ability to tune out interfering signals, an art which has been rapidly advancing to meet the demands of broadcasting. Is appropriation to be determined by the first use of a given wave length or frequency, irrespective of power, or is the station of the greatest power to be preferred over the distant small-powered station? The larger stations using 5,000 watts power and serving a wide area have a nuisance radius of 3,000 miles (*United States* v. *American Bond and Mortgage Co.*, 31 F. (2d) 448, 453). In the present state of the art there are only 90 channels, i. e., frequencies sufficiently far apart from other used frequencies to prevent interference, available for United States broadcasting stations.[2] It is therefore safe to assume that nearly all of these channels have at some time been used by local stations using little power. If the smaller stations must prevail because of prior use the larger stations serving wide areas must be silenced. If power is to be the test, the smaller stations will be destroyed and the field will soon be occupied by a few stations using the highest practicable power. Or is appropriation to fluctuate with the perfection of sharply tuned receiving instruments?

A very brief reference to the development of the art of radio reception will serve to show how mis-

[2]Annual Report of the Federal Radio Commission for the year ended June 30, 1928, p. 6.

leading are the analogies upon which the appellant relies and how groundless is his claim of prior appropriation. From the radio-transmitting station continuous waves of the same radio frequency are radiated in all directions with the speed of light. Upon these carrier waves the signals are impressed by modulation, and similar oscillations are set up in the receiving antennae of every receiving station within the range of the transmitting station. Thus the antenna of each receiving set receives the oscillations of varying frequencies from all transmitting stations within range, and in operation must select the oscillations coming from the station whose signals are desired.

In the early devices selectivity of a kind was obtained by the use of successively tuned circuits, each of which to a degree screened out the interfering oscillations with which they were not in resonance and passed on the desired oscillations with which they were in resonance.[3]

The selectivity in such circuits was, however, dependent upon the use of inductive coupling between the successive circuits, and with loose coupling the strength of the desired signal was greatly diminished. If close coupling was employed to increase the signal strength the undesired oscillations were

[3] Stone U. S. Patent No. 714756, December 2, 1902; Marconi-Franklin British Patent No. 12960, December 23, 1907. *Radio Corporation of America* v. *Splitdorf Electrical Co.*, 14 F. (2d) 643; *Radio Corporation of America* v. *E. J. Edmond & Co.*, 20 F. (2d) 929.

carried from one circuit to another and the system ceased to be selective. Thus, with these devices it was extremely difficult, if not impossible, to detect the weak signals of far-distant stations when the antenna was affected by the interference of powerful near-by stations, and such instruments would have been quite useless for the reception of modern broadcasting.

Through the use of the DeForest audion as a relay between tuned circuits inductively coupled, Alexanderson was able to substantially increase the strength of the signal without impairment of selectivity.[4]

But with the introduction of the audion new problems were presented. The regenerative effect of the audion, first explained by DeForest and Armstrong,[5] produced oscillations in the receiving instrument manifested by squeals, howls, and whistles which, if not controlled, drowned out the incoming signals.[6]

It was not until these problems were solved that a receiving instrument of sufficient stability for general domestic use was perfected. Their solu-

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[4] See *C. G. E. Co., Ltd.*, v. *Fada Radio, Ltd.* [Privy Council] 1930 A. C. 97. Decisions below reported in (1927) 2 Dominion Law Reports, 911; (1928) 2 D. L. R., 193; *Radio Corp'n of America* v. *Splitdorf Electrical Co., supra; Radio Corp'n of America* v. *E. J. Edmond & Co., supra.*

[5] *Armstrong* v. *DeForest Radio Tel. & Tel. Co.* (C. C. A. 2d), 280 Fed. 584.

[6] *Hazletine Corp'n* v. *Electric Service Engineering Corp.*, 18 F. (2d) 662.

tion was not fully accomplished[7] until after the late war when the building of receiving sets satisfactory for general domestic use first became possible, and the development of radio broadcasting began.[8] Further developments and improvements in this art have been rapid, and with the perfection of new instruments the distance at which satisfactory reception is possible has been extended and means for excluding undesired and interfering signals have been perfected. Thus the band of frequencies within which plurality of signals can not be transmitted without interference in reception has been narrowed.

The art is still progressing, and new arts in this field, such as television, are being developed in which the use of radio frequency oscillations is essential. With the development of the arts it may be necessary to entirely rearrange the present distribution of radio frequencies so as to make them available for new uses. Thus the principle of prior appropriation, if recognized as the basis of exclusive right, will not only prevent orderly regulation of interstate commerce but will effectually bar the development of the arts.

Finally, even if the operation of a broadcasting station may give it a property right based on prior

[7] One method, for example, was the neutrodyne system, devised by Hazletine. *Hazletine Corp'n* v. *Electric Service Engineering Corp., supra.*

[8] Report of Committee on Radio Law (52nd Ann. Rep. Am. Bar. Ass'n, p. 439).

appropriation which it can assert against the regulatory powers of Congress (which the Government denies) the conditions existing when appellant began broadcasting in August, 1926, were such as to raise a strong inference that the operation of his station caused interference with prior broadcasting stations. If this be true, appellant's assertion of a property right based on prior appropriation fails. Those conditions are forcibly stated in an address by one of the Federal Radio Commissioners, quoted on pages 10 and 11 of the Commission's annual report for the year ended June 30, 1927, as follows:

> In July, 1926, just 10 months ago, the Attorney General of the United States rendered his famous opinion that the Secretary of Commerce, under the radio law of 1912, was without power to control the broadcasting situation or to assign wave lengths. Thus, after five years of orderly development, control was off. Beginning with August, 1926, anarchy reigned in the ether.
>
> As the result many stations jumped without restraint to new wave lengths which suited them better, regardless of the interference which they might thus be causing to other stations. Proper separation between established stations was destroyed by other stations coming in and camping in the middle of any open spaces they could find, each interloper thus impairing reception of three stations—his own and two others.
>
> Instead of the necessary 50-kilocycle separation between stations in the same com-

munity, the condition soon developed where separations of 20 and 10 kilocycles, and even 8, 5, and 2 kilocycles, existed. Under such separations, of course, stations were soon wildly blanketing each other while distracted listeners were assailed with scrambled programs.

II

RESTRICTION OF THE POWER OF APPELLANT'S STATION IN ORDER TO CARRY OUT THE REGULATORY PROVISIONS OF THE RADIO ACT OF 1927 WAS NOT A "TAKING" OF PRIVATE PROPERTY FOR THE PUBLIC USE WITHIN THE MEANING OF THE FIFTH AMENDMENT

The fourth question certified by the Circuit Court of Appeals asks whether the action of the Federal Radio Commission in restricting the power of appellant's station was a taking of private property for public use without just compensation. The court did not ask whether such action deprived appellant of property without due process of law. Notwithstanding the limited scope of the question certified, appellant's brief (p. 25) alleges that the Commission's action was a violation of the due process clause of the Fifth Amendment, and his brief, except for the flooding cases previously discussed (*supra*, p. 21), relies wholly on decisions concerning due process. The fifth question certified to this Court relates to the due process clause of the Fifth Amendment, but only in connection with (1) the standard provided for the guidance of the Commission by the Radio Act of 1927 and the amenda-

tory act of March 28, 1928, and (2) the provisions for a hearing contained in the former Act.

The Government contends that the Commission's action in restricting the power of appellant's station was neither a taking of appellant's property for the public use nor a deprivation of his property without due process, but it does not thereby concede that the latter question has been presented to this Court. The Government also submits that there is a distinction between a taking of property for the public use and a deprivation of property without due process. A taking of property for the public use seems to imply actual use or invasion of tangible physical property. On the other hand, a general regulatory statute which restricts the use of property or prohibits carrying on a business may deprive a person of property without due process if the statute is not within the constitutional powers of the enacting sovereign, but no case has been found where such restriction or prohibition has been held to be a taking within the meaning of the Fifth Amendment. *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, is not an exception. That case held that when the United States acquired a lock and dam by condemnation proceedings, just compensation included the value of the company's franchise to collect tolls. Even when the United States takes land by eminent domain, the owner is not entitled under the Fifth Amendment to compensation for loss of a business thereby destroyed. *Mitchell* v. *United States*, 267 U. S. 341.

Appellant contends that the reduction in the power of his station virtually prohibited his broadcasting and quotes *Hammer* v. *Dagenhart*, 247 U. S. 251, 269, 271, as holding that the commerce clause authorizes regulation, not prohibition, of interstate commerce. That case held that an Act of Congress prohibiting interstate shipment of articles produced in mines or factories employing child labor bore no reasonable relation to the regulation of interstate commerce, was an attempted exertion of power to regulate the hours of labor of children in factories and mines within the States, and was therefore invalid. But the prohibitions of the Radio Act are obviously necessary to adequate regulation of interstate commerce. They deal with crowded traffic and, like the "stop" and "go" signals in a busy city street, are prohibitive only in a regulative sense because necessary if traffic is to move at all.

State regulation of traffic upon highways, excluding heavy vehicles from their use, is valid even as applied to interstate commerce in the absence of legislation by Congress which deals specifically with the subject. In *Morris* v. *Duby*, 274 U. S. 135, the appellants complained that an established business, in which they had been engaged for four years, was rendered unprofitable and thus destroyed by such regulation, which they attacked as in violation of the Constitution, as arbitrary, unreasonable, and confiscatory, and as creating a monopoly in favor of

other common carriers in competition with the appellants. It was held that injunctive relief was rightly refused and that the bill was properly dismissed.

Some measure of prohibition is inherent in all regulation, and under the Fifth and Fourteenth Amendments the constitutionality of prohibitive regulation depends, not on the complete absence of any element of prohibition, but on whether the statute is in fact an exercise of legislative power. In *C., B. & Q. Railway Co.* v. *Drainage Commissioners*, 200 U. S. 561, 593–594, this Court said:

> If the injury complained of is only incidental to the legitimate exercise of governmental powers for the public good, then there is no taking of property for the public use, and a right to compensation, on account of such injury, does not attach under the Constitution.

In *Atlantic Coast Line* v. *Goldsboro*, 232 U. S. 548, 558–559, this Court said:

> And the enforcement of uncompensated obedience to a regulation established under this power for the public health or safety is not an unconstitutional taking of property without compensation or without due process of law.

Where the public interest is involved and where the statutory provisions are reasonably adapted to serve such interest, the legislature may, without providing compensation therefor, compel the discontinuance of a business, restrict the number of

those engaged in a business or profession, or otherwise impose burdens on property or on those engaged in business. This Court has sustained, as against an assertion of invalidity under the due process of the Fourteenth Amendment, statutes or municipal ordinances which compel the discontinuance of such businesses as manufacturing and selling oleomargarine, *Powell* v. *Pennsylvania,* 127 U. S. 678; selling futures in grain or other commodities, *Booth* v. *Illinois,* 184 U. S. 425; selling stocks on margin, *Otis* v. *Parker,* 187 U. S. 606; keeping billiard halls, *Murphy* v. *California,* 225 U. S. 623; selling trading stamps, *Rast* v. *Van Deman & Lewis Co.,* 240 U. S. 342, 368.

This Court has held that it is not a violation of the due process clause of the Fourteenth Amendment to enforce uncompensated obedience to a statute or municipal ordinance which limits the number and location of slaughter houses and creates a regulated monopoly, *Slaughter-House Cases,* 16 Wall. 36; which requires those then practicing a profession to take examinations, *Dent* v. *West Virginia,* 129 U. S. 114; which authorizes the Governor of a State to determine the number of licensed pilots and prohibits those not licensed from acting as pilots, *Olsen* v. *Smith,* 195 U. S. 332; which makes it unlawful for a livery stable, not a nuisance *per se,* to continue its business within certain city limits, *Reinman* v. *Little Rock,* 237 U. S. 171; which restricts the character of buildings which can be erected within a zoned area,

although freedom from restriction would greatly enhance the market value of the property, *Zahn* v. *Bd. of Public Works*, 274 U. S. 325; which assesses State banks for the purpose of creating a depositors' guaranty fund, although thereby property might be taken without return to pay debts of a failing rival bank, *Noble State Bank* v. *Haskell*, 219 U. S. 104.

Liggett Co. v. *Baldridge*, 278 U. S. 107, and *Penna. Coal Co.* v. *Mahon*, 260 U. S. 393, decisions upon which appellant relies, are applications of the same principle to the particular facts involved. In the former case the Court found that prohibiting a corporation from owning a pharmacy or drug store unless all its stockholders were licensed pharmacists could have no reasonable or substantial relation to the public health. In the latter case the Court found that a statute forbidding the mining of coal in such a way as to cause the subsidence of a dwelling house not only destroyed well-recognized existing rights of property and contract, but that it could not be justified as a measure taken to protect public safety.

If it is assumed that prior to the enactment of the Radio Act of 1927 appellant obtained some kind of a property right which he could assert against the regulatory power of Congress over interstate commerce, the primary question presented is whether the provisions of this Act authorizing the Federal Radio Commission to grant or deny licenses, and

to fix power, frequency, and time of operation of the stations to whom licenses are granted, had some reasonable relation to the regulation in the public interest of radio transmission and broadcasting. We submit that these powers are essential to adequate regulation.

The Radio Act of 1927 was passed to remedy the chaotic conditions then existing in the broadcasting field. These conditions were succinctly described in the President's Annual Message to the 69th Congress, Second Session, as follows (Cong. Rec., Vol. 68, Pt. 1, p. 32):

> Due to decisions of the courts, the authority of the department under the law of 1912 has broken down; many more stations have been operating than can be accommodated within the limited number of wave lengths available; further stations are in course of construction; many stations have departed from the scheme of allocation set down by the department, and the whole service of this most important public function has drifted into such chaos as seems likely, if not remedied, to destroy its great value. I most urgently recommend that this legislation should be speedily enacted.

There was widespread public demand for regulatory legislation. Congressman White, upon the submission on March 12, 1926, of the House Committee Report on the White bill, which in slightly amended form became the Radio Act of 1927 and which contained the substance of the licensing re-

quirements embodied in that Act, said, speaking for the Committee (Cong. Rec., Vol. 67, Pt. 3, p. 5478):

> Mr. Chairman, the necessity for radio legislation has in recent years been often called to the attention of your committee by the Department of Commerce; consideration of the problem and action with respect to it have been urged on the Congress by two Chief Executives. The great listening public and representatives of those directly connected with the radio industry have urged upon us the need for congressional action. The most recent and authoritative utterance by the radio world was given by the Fourth National Radio Conference, held in Washington November, 1925. The conference was attended by about 500, including representatives of the listeners of broadcasting stations, amateurs, manufacturers, engineering societies, Government departments, and many others. It formally expressed the opinion that existing Federal statutes are inadequate to permit proper administration of existing radio activities, and that the public interest required that legislation be enacted. It followed these general recommendations with detailed suggestions. The pending bill is your committee's response to these requests; it is our contribution to the solution of the difficulties which are so generally recognized.
>
> Whatever its defects may be, the bill is approved generally in form and substance by many whose interest in and knowledge of

> the subject should command respect for their opinions. It comes with the approval of the Department of Commerce, charged for 14 years with the administration of existing radio law; it bears the indorsement of the amateurs of the country, speaking through their national organization, the American Radio Relay Association; it is commended by the National Association of Broadcasters, by the United States Shipping Board, the Director of Naval Communications, the Coast Guard of the Treasury, the Signal Corps of the Army, and other interests and individuals.

All of those interested in radio legislation approved the principle of limiting the number of broadcasting stations. Referring to the radio conference described in his opening statement quoted above, Congressman White said (Cong. Rec., Vol. 67, Pt. 5, p. 5479):

> It recognized that in the present state of scientific development there must be a limitation upon the number of broadcasting stations and it recommended that licenses should be issued only to those stations whose operation would render a benefit to the public, are necessary in the public interest, or would contribute to the development of the art. This principle was approved by every witness before your committee.

The evils which the proposed legislation was designed to remedy he summarized as follows (Cong. Rec., Vol. 67, Pt. 5, p. 5480):

> We do assert that the difficulties which confront us, the congestion which exists, the unwarranted grouping of stations, the complaints arising from the distribution of wave lengths and from the use of power are inevitable under existing law, which gives no powers commensurate with the problem.

The report of the committee on radio law of the American Bar Association, submitted to the 1929 annual meeting of the Association, refers to the chaotic conditions existing when the Radio Act of 1927 was enacted and which had resulted in part from the opinion of the Acting Attorney General (35 Op. A. G. 126, *supra*) that the Radio Communication Act of 1912 did not authorize the Secretary of Commerce to restrict the frequency, power, or hours of operation of a radio station. The committee reported:[9]

> In the period which intervened between July 9, 1926, and the enactment of the Radio Act of 1927 on February 23, 1927, nearly 200 new broadcasting stations came into existence, bringing the total up to 733. These new stations selected such frequencies as they chose without regard to interference or the rights of either American or Canadian stations. Existing stations which were dissatisfied "jumped" to other frequencies and increased their power and hours of operation at will. The result was a chaos which will long be remembered in the radio

[9] Report of 52nd Annual Meeting of American Bar Association, p. 442.

> world as the "breakdown of the law," in which radio reception was virtually ruined.

Confronted with a situation where unregulated broadcasting was destroying itself because the various stations were interfering with the reception of each other's programs, due to an excessive number of stations and to an unscientific distribution among them of frequency, power, hours of operation, and location, Congress passed the Radio Act of 1927. Section 1 (*infra,* p. 53) asserts Government control over all channels of radio transmission and prohibits, except with a license granted under the Act, interstate and foreign radio transmission and radio transmission the effect of which extends beyond the borders of a State or interferes with interstate radio transmission. Section 3 (*infra,* p. 54) creates a Federal Radio Commission. Section 4 (*infra,* p. 55) provides that the Federal Radio Commission, from time to time, as public convenience, interest, or necessity requires, shall, among other things—

> (*c*) Assign bands of frequencies or wave lengths to the various classes of stations, and assign frequencies or wave lengths for each individual station and determine the power which each station shall use and the time during which it may operate;
>
> (*d*) Determine the location of classes of stations or individual stations.

Section 9 (*infra,* p. 56) provides that in considering applications for licenses and renewals of licenses the Commission shall distribute licenses,

frequency, power, and hours of operation among the different States and communities so as to give to each fair, efficient, and equitable radio service. Section 11 (*infra*, p. 58) authorizes the Commission to issue or renew a license if upon examination of any application it shall determine that the public convenience, interest, or necessity would be thereby served. It provides for a hearing if its determination is adverse to the applicant. Section 16 (*infra*, p. 59) permits an appeal to the Court of Appeals of the District of Columbia from orders denying licenses or renewals.

The authority thus given the Federal Radio Commission bears a reasonable relation to regulation in the public interest of radio transmission and broadcasting and there was therefore no arbitrary abuse of legislative power.

First, these powers are necessary because the number of broadcasting stations which can efficiently operate is limited. To prevent interference in reception there must be a separation of at least 10 kilocycles (kc.) between the frequencies used. By frequency (also called wave length) is meant the rate of alternation per second, usually expressed in kilocycles, of the alternating electric current which actuates the sending antennæ of the transmitting station and produces a carrier wave of the same frequency by means of which the signals are carried.

The frequencies from 550 kc. to 1,500 kc. are used for broadcasting, and receiving sets are designed to receive these frequencies. This provides 96 broad-

casting channels separated by 10 kilocycles, and six of these have been reserved for the exclusive use of Canadian stations and eleven more are shared between United States and Canadian stations. (Third Annual Report, Federal Radio Commission, p. 15.) Frequencies below 550 kc. and above 1,500 kc. are used by stations engaged in various kinds of communication, transoceanic, ship to ship and ship to shore, point to point, land and aircraft. In addition, many governmental, amateur, and experimental (including television) stations are licensed to use these frequencies. (*Ibid*, pp. 15, 20, 22–23.)

Secondly, control of the frequency, power, hours of operation, and location of broadcasting stations is necessary in order to cope with the problems of interference. When the frequencies used by stations are too close, reception is interfered with by a note produced by the receiving set varying from a low growl to a high whistle, and having a pitch corresponding exactly to the amount of separation between the frequencies. This is known as heterodyne interference and it extends far beyond the area where a station gives good service to listeners. This nuisance radius of a station of a given power will vary from frequency to frequency, from locality to locality, from season to season, from day to night, and even from hour to hour. Interference known as "cross talk" means that the receiving set receives both the program desired and the program of some other station. It results when the close proximity or greater power of the latter station produces a much

greater signal strength. To prevent "cross talk," stations located in the same vicinity should ordinarily be separated by at least 50 kc. and stations of great differences in power must be separated by more than 10 kc. "Blanketing" is a form of exaggerated "cross talk." In that case the program from an undesired station drowns out the desired program. Because of this, stations in thickly inhabited communities can not safely be permitted to have high, or even substantial, power. Even a 500-watt station creates such a strong signal strength within a radius of two or three miles that it may blanket this area.[10]

The Federal Radio Commission decided in this case that continued operation of appellant's station with power greater than 100 watts is not in the public interest. Appellant did not exercise his statutory right of appeal and this determination is conclusive in the present proceedings. Appellant is forced to contend, therefore, that the mere fact that he began to operate before Congress exercised its regulatory power gave him a constitutional right to obstruct an allocation, made in the public

[10] We believe that the Court will take judicial notice of the scientific facts to which reference has been made. They are all included in the report of the Committee on Radio Law. (Report of 52nd Ann. Meeting of Am. Bar Ass'n, *supra*, pp. 412, 414, 424, 428–431.) They are also substantially covered by the testimony of a prominent radio engineer, J. V. L. Hogan (Hearings of House Merchant Marine and Fisheries Committee on H. R. 15430, 70th Cong., 2nd Sess., pp. 359–380), and by the opinion in *United States* v. *American Bond and Mortgage Co.*, 31 F. (2d) 448, 451–453, *supra*.

interest, of the channels available for broadcasting, and to contend that if a regulatory body orders a discontinuance of this obstruction, there is a taking of property for the public use analogous to a taking by eminent domain.

Appellant's contention would seem to have far less merit than that of the bridge owner who, after he has erected a bridge which is not an obstruction to commerce, is compelled to remove it at his own expense when an improvement of navigation renders it an obstruction. In assuming to operate a broadcasting station appellant was encroaching upon what was just as obviously a medium for interstate communication, whatever the precise scientific explanation, as navigable waters are a medium for water-borne commerce.

Appellant appears to rely principally on *Penna. Coal Company* v. *Mahon*, 260 U. S. 393, *supra*. But in that case the effect of the statute was to transfer certain property rights from one group in the community, coal miners, to another group, owners of dwelling houses, and the statute was not reasonably necessary to carry out a legislative power. The Radio Act of 1927 does not thus retransfer recognized property rights. It authorizes the Federal Radio Commission to determine, after hearing and with right of appeal, who will best serve the public needs in radio communication. In such determination priority is an important factor and the statutory reviewing body, the Court of Appeals of the District of Columbia, has so held (*Chi-*

cago Federation of Labor v. *Federal Radio Commission*, 41 F. (2d) 422, 423), although it has also ruled that as between two meritorious stations priority is not in and of itself decisive (*Great Lakes Broadcasting Co.* v. *Federal Radio Commission*, 37 F. (2d) 993, 995). Appellant's contention, in substance, is that because the statute does not make priority the only test, it authorizes or requires an unconstitutional taking of property for the public use.

The Court of Appeals of the District of Columbia has held that there is no taking of private property within the meaning of the Fifth Amendment when the Federal Radio Commission refuses to grant a license permitting a broadcasting station to operate as extensively as it had operated prior to the enactment of the Radio Act of 1927. *City of New York* v. *Federal Radio Commission*, 36 F. (2d) 115, 116; *Technical Radio Laboratory* v. *Federal Radio Commission*, 36 F. (2d) 111, 113 *supra*; *General Electric Co.* v. *Federal Radio Commission*, 31 F. (2d) 630, 633.

III

THE RADIO ACT OF 1927 IS NOT WANTING IN DUE PROCESS BECAUSE OF INDEFINITENESS IN THE STATUTORY STANDARD OF PUBLIC INTEREST, CONVENIENCE, OR NECESSITY OR BECAUSE THE ACT DID NOT REQUIRE THE COMMISSION FURTHER TO DEFINE THE ISSUES IN ADVANCE OF A HEARING BEFORE IT

Section 9 (*infra*, p. 56) authorizes the Commission to grant a station a license "if public convenience, interest, or necessity will be served

thereby." Section 11 (*infra*, p. 58) requires the Commission to notify an applicant and give him a hearing if it determines that "public interest, convenience, or necessity" would not be served by granting a license or a renewal of a license. Section 4 (*infra*, p. 55) requires the Commission to assign the frequency, power, and time of operation of stations "as public convenience, interest, or necessity requires." Appellant contends that this statutory standard is so broad and meaningless, as applied to radio broadcasting, that it permits an arbitrary determination by the Commission and that it constitutes an invalid delegation of legislative power to the Commission.

The prescribed statutory standard is to be read in the light of further provisions of the Act which fix the principles to govern the Commission in passing upon applications for licenses and give precision to the general language of the statutory standard. Section 9 requires the Commission to equalize broadcasting service among the different States and communities so as to give to each "fair, efficient, and equitable radio service." The amendatory Act of March 28, 1928 (*infra*, p. 63) further provides that the people of all the zones established by Section 2 of the Act are entitled to equality of radio broadcasting service, both of transmission and reception. It requires the Commission to allocate equally to each zone, as nearly as possible, broadcasting licenses, bands of frequency, periods of time for operation, and station

power. Section 10 (*infra*, p. 57) requires applicants for licenses to set forth in writing certain facts as to their qualifications, equipment, and proposed operations, facts which the Commission undoubtedly is to consider in determining whether the granting of a license would serve public interest, convenience, or necessity.

Mutual Film Corp. v. *Ohio Industrial Commission*, 236 U. S. 230, *supra*, upheld an Ohio statute, attacked (p. 231) under the Fourteenth Amendment, which prohibited the exhibition of motion-picture films unless first approved by a board of censors. The statute provided (p. 240) that the board should approve only such films as were in its judgment "of a moral, educational or amusing and harmless character." This Court said (pp. 245–246):

> The objection to the statute is that it furnishes no standard of what is educational, moral, amusing, or harmless, and hence leaves decision to arbitrary judgment, whim and caprice; or, aside from those extremes, leaving it to the different views which might be entertained of the effect of the pictures, permitting the "personal equation" to enter, resulting "in unjust discrimination against some propagandist film," while others might be approved without question. But the statute by its provisions guards against such variant judgments, and its terms, like other general terms, get precision from the sense and experience of men and become certain and useful guides in reasoning and conduct.

> The exact specification of the instances of their application would be as impossible as the attempt would be futile. Upon such sense and experience, therefore, the law properly relies.

Mahler v. *Eby*, 264 U. S. 32, sustained the validity of an Act of Congress permitting the Secretary of Labor to deport certain classes of aliens whom he determines to be "undesirable residents" of the United States. This Court (pp. 37, 41) rejected the contention that the statute was contrary to the due process clause of the Fifth Amendment because the statutory criterion was so vague and uncertain that it left the liberty of the alien to the whim and caprice of an executive officer. It also held (p. 40) that the statute was not an invalid delegation of legislative power.

The statutory standard of the Radio Act of 1927 is not unknown to the law. Section 1, paragraph 18, of the Interstate Commerce Act, as added by the Transportation Act of 1920, c. 91, 41 Stat. 477, prohibits new railroad construction or the abandonment of a railroad line without first obtaining from the Interstate Commerce Commission a certificate that the "present or future public convenience and necessity" require or permit such action. Action by the Commission taken thereunder was upheld in *Colorado* v. *United States*, 271 U. S. 153. Many State statutes also require public utilities to obtain a certificate of public convenience and necessity

before commencing new construction or new operations and the courts have frequently interpreted and applied such a requirement. See *Wabash C. & W. R. R. Co.* v. *Commerce Commission,* 309 Ill. 412, 418–419; *Red Star Transportation Co.* v. *Red Dot Coach Line,* 220 Ky. 424, 427–428; *McLain* v. *Public Utilities Commission,* 110 Oh. St. 1, 5–14.

The Commission has announced that among the principles which have guided it in applying the statutory standard are avoidance of interference and, particularly, blanketing; avoidance of duplication of the same order of program in any community; encouraging stations distinctly local in character and stations equipped and financed to give a high order of service over as large a territory as possible; the licensee's record; the amount of "direct advertising" perimtted by the station; and precedence to the interests of the listening public over those of the individual broadcaster or advertiser.[11]

The fifth question certified by the lower court also asks whether the Radio Act of 1927 is wanting in due process because it does not require the Commission to specify in advance of a hearing its grounds for calling upon an applicant to establish that public interest, convenience, or necessity would be served by granting his application. Section 16 of the Act (*infra,* p. 59) permits an appeal to the Court of Appeals of the District of

[11] Annual Report of the Federal Radio Commission for the year ended June 30, 1928, pp. 166–170.

Columbia from any order denying an application for a renewal of a license. Upon such appeal the Commission is required to file with that court a full statement of the facts and grounds for its decision. The court may hear additional evidence and alter or revise the judgment of the Commission.

Even if the hearing required by due process demands that the issues to be determined be stated in advance in more detail than in the terms of the statutory standard (which the Government denies), the hearing before the court on appeal fully satisfies this requirement. The hearing required by due process may occur at any step in the proceedings. *Consolidated Rendering Co.* v. *Vermont*, 207 U. S. 541, 551. Appellant, having failed to exhaust his administrative remedies, cannot urge lack of due process. *United States* v. *Sing Tuck*, 194 U. S. 161, 167–168.

IV

IF APPELLANT'S PROPERTY WAS TAKEN FOR THE PUBLIC USE CONTRARY TO THE FIFTH AMENDMENT, ASIDE FROM THE WAIVERS WHICH HE SIGNED, THE GOVERNMENT DOES NOT CONTEND THAT THESE WAIVERS RENDERED THE TAKING VALID

If this Court answers in the negative either the first or fourth questions certified by the Circuit Court of Appeals, it is unnecessary to answer the second and third questions relating to the validity of certain waivers signed by appellant as required by the Joint Resolution of Congress of December 8, 1926 (*infra*, p. 64) and by the Radio Act of 1927

or the waiver incorporated in his license as required by subparagraph (A) of Section 11 (*infra*, p. 59) of this Act.

If this Court answers both the first and fourth questions in the affirmative, the Government sees no reason to believe that the waivers referred to in the second and third questions would impart validity to an otherwise unconstitutional taking of appellant's property.

We submit that these waiver provisions have this significance: they indicate that Congress believed that the operation of a radio station, whether before or after the enactment of the Radio Act of 1927, created no property right in the owner thereof which could be asserted against the plenary regulatory power of Congress.

CONCLUSION

It is respectfully submitted that the first question certified should be answered in the negative. It is further respectfully submitted that if the first question is answered in the affirmative, the fourth and fifth questions certified should be answered in the negative.

THOMAS D. THACHER,
Solicitor General.
CHARLES H. WESTON,
WILLIAM G. DAVIS,
Special Assistants to the Attorney General.

NOVEMBER, 1930.

APPENDIX

The Fifth Amendment to the Constitution provides:

> No person shall be * * * deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Act of February 23, 1927, known as the Radio Act of 1927, c. 169, 44 Stat. 1162 (U. S. C. Sup. III, Title 47, sec. 81, *et seq.*), provides in part as follows:

> SEC. 1. That this Act is intended to regulate all forms of interstate and foreign radio transmissions and communications within the United States, its Territories, and possessions; to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by individuals, firms, or corporations, for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. That no person, firm, company, or corporation shall use or operate any apparatus for the transmission of energy or communications

or signals by radio (a) from one place in any Territory or possession of the United States or in the District of Columbia to another place in the same Territory, possession, or District; or (b) from any State, Territory, or possession of the United States, or from the District of Columbia to any other State, Territory, or possession of the United States; or (c) from any place in any State, Territory, or possession of the United States, or in the District of Columbia, to any place in any foreign country or to any vessel; or (d) within any State when the effects of such use extend beyond the borders of said State, or when interference is caused by such use or operation with the transmission of such energy, communications, or signals from within said State to any place beyond its borders, or from any place beyond its borders to any place within said State, or with the transmission or reception of such energy, communications, or signals from and/or to places beyond the borders of said State; or (e) upon any vessel of the United States; or (f) upon any aircraft or other mobile stations within the United States, except under and in accordance with this Act and with a license in that behalf granted under the provisions of this Act.

SEC. 2. For the purposes of this Act, the United States is divided into five zones, * * *.

SEC. 3. That a commission is hereby created and established to be known as the

Federal Radio Commission, hereinafter referred to as the commission, * * *.

SEC. 4. Except as otherwise provided in this Act, the commission, from time to time, as public convenience, interest, or necessity requires, shall—

(*a*) Classify radio stations;

(*b*) Prescribe the nature of the service to be rendered by each class of licensed stations and each station within any class;

(*c*) Assign bands of frequencies or wave lengths to the various classes of stations, and assign frequencies or wave lengths for each individual station and determine the power which each station shall use and the time during which it may operate;

(*d*) Determine the location of classes of stations or individual stations;

(*e*) Regulate the kind of apparatus to be used with respect to its external effects and the purity and sharpness of the emissions from each station and from the apparatus therein;

(*f*) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this Act: *Provided, however,* That changes in the wave lengths, authorized power, in the character of emitted signals, or in the times of operation of any station, shall not be made without the consent of the station licensee unless, in the judgment of the commission, such changes will promote public convenience or interest or will serve public necessity or the

provisions of this Act will be more fully complied with;

(*g*) Have authority to establish areas or zones to be served by any station;

* * * * *

SEC. 5. From and after one year after the first meeting of the commission created by this Act, all the powers and authority vested in the commission under the terms of this Act, except as to the revocation of licenses, shall be vested in and exercised by the Secretary of Commerce; except that thereafter the commission shall have power and jurisdiction to act upon and determine any and all matters brought before it under the terms of this section.

* * * * *

No station license shall be granted by the commission or the Secretary of Commerce until the applicant therefor shall have signed a waiver of any claim to the use of any particular frequency or wave length or of the ether as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise.

SEC. 9. The licensing authority, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this Act, shall grant to any applicant therefor a station license provided for by this Act.

In considering applications for licenses and renewals of licenses, when and in so far as there is a demand for the same, the licensing authority shall make such a distribution

of licenses, bands of frequency of wave lengths, periods of time for operation, and of power among the different States and communities as to give fair, efficient, and equitable radio service to each of the same.

No license granted for the operation of a broadcasting station shall be for a longer term than three years and no license so granted for any other class of station shall be for a longer term than five years, and any license granted may be revoked as hereinafter provided. Upon the expiration of any license, upon application therefor, a renewal of such license may be granted from time to time for a term of not to exceed three years in the case of broadcasting licenses and not to exceed five years in the case of other licenses.

No renewal of an existing station license shall be granted more than thirty days prior to the expiration of the original license.

SEC. 10. The licensing authority may grant station licenses only upon written application therefor addressed to it. All applications shall be filed with the Secretary of Commerce. All such applications shall set forth such facts as the licensing authority by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station; the ownership and location of the proposed station and of the stations, if any, with which it is proposed to communicate; the frequencies or wave lengths and the power desired

to be used; the hours of the day or other periods of time during which it is proposed to operate the station; the purposes for which the station is to be used; and such other information as it may require. The licensing authority at any time after the filing of such original application and during the term of any such license may require from an applicant or licensee further written statements of fact to enable it to determine whether such original application should be granted or denied or such license revoked. Such application and/or such statement of fact shall be signed by the applicant and/or licensee under oath or affirmation.

* * * * *

SEC. 11. If upon examination of any application for a station license or for the renewal or modification of a station license the licensing authority shall determine that public interest, convenience, or necessity would be served by the granting thereof, it shall authorize the issuance, renewal, or modification thereof in accordance with said finding. In the event the licensing authority upon examination of any such application does not reach such decision with respect thereto, it shall notify the applicant thereof, shall fix and give notice of a time and place for hearing thereon, and shall afford such applicant an opportunity to be heard under such rules and regulations as it may prescribe.

Such station licenses as the licensing authority may grant shall be in such general form as it may prescribe, but each license shall contain, in addition to other provisions, a statement of the following conditions to which such license shall be subject:

(A) The station license shall not vest in the licensee any right to operate the station nor any right in the use of the frequencies or wave length designated in the license beyond the term thereof nor in any other manner than authorized therein.

* * * * *

SEC. 16. Any applicant for a construction permit, for a station license, or for the renewal or modification of an existing station license whose application is refused by the licensing authority shall have the right to appeal from said decision to the Court of Appeals of the District of Columbia; and any licensee whose license is revoked by the commission shall have the right to appeal from such decision of revocation to said Court of Appeals of the District of Columbia or to the district court of the United States in which the apparatus licensed is operated, by filing with said court, within twenty days after the decision complained of is effective, notice in writing of said appeal and of the reasons therefor.

The licensing authority from whose decision an appeal is taken shall be notified of said appeal by service upon it, prior to the filing thereof, of a certified copy of said ap-

peal and of the reasons therefor. Within twenty days after the filing of said appeal the licensing authority shall file with the court the originals or certified copies of all papers and evidence presented to it upon the original application for a permit or license or in the hearing upon said order of revocation, and also a like copy of its decision thereon and a full statement in writing of the facts and the grounds for its decision as found and given by it. Within twenty days after the filing of said statement by the licensing authority either party may give notice to the court of his desire to adduce additional evidence. Said notice shall be in the form of a verified petition stating the nature and character of said additional evidence, and the court may thereupon order such evidence to be taken in such manner and upon such terms and conditions as it may deem proper.

At the earliest convenient time the court shall hear, review, and determine the appeal upon said record and evidence, and may alter or revise the decision appealed from and enter such judgment as to it may seem just. The revision by the court shall be confined to the points set forth in the reasons of appeal.

* * * * *

SEC. 21. No license shall be issued under the authority of this Act for the operation of any station the construction of which is begun or is continued after this Act takes effect, unless a permit for its construction has been granted by the licensing authority

upon written application therefor. The licensing authority may grant such permit if public convenience, interest, or necessity will be served by the construction of the station. * * *

* * * Upon the completion of any station for the construction or continued construction for which a permit has been granted, and upon it being made to appear to the licensing authority that all the terms, conditions, and obligations set forth in the application and permit have been fully met, and that no cause or circumstance arising or first coming to the knowledge of the licensing authority since the granting of the permit would, in the judgment of the licensing authority, make the operation of such station against the public interest, the licensing authority shall issue a license to the lawful holder of said permit for the operation of said station. Said license shall conform generally to the terms of said permit.

* * * * *

SEC. 31. The expression "radio communication" or "radio communications" wherever used in this Act means any intelligence, message, signal, power, pictures, or communication of any nature transferred by electrical energy from one point to another without the aid of any wire connecting the points from and at which the electrical energy is sent or received and any system by means of which such transfer of energy is effected.

SEC. 32. Any person, firm, company, or corporation failing or refusing to observe or violating any rule, regulation, restriction, or condition made or imposed by the licensing authority under the authority of this Act or of any international radio convention or treaty ratified or adhered to by the United States, in addition to any other penalties provided by law, upon conviction thereof by a court of competent jurisdiction, shall be punished by a fine of not more than $500 for each and every offense.

SEC. 33. Any person, firm, company, or corporation who shall violate any provision of this Act, or shall knowingly make any false oath or affirmation in any affidavit required or authorized by this Act, or shall knowingly swear falsely to a material matter in any hearing authorized by this Act, upon conviction thereof in any court of competent jurisdiction shall be punished by a fine of not more than $5,000 or by imprisonment for a term of not more than five years or both for each and every such offense.

* * * * *

SEC. 40. This Act shall take effect and be in force upon its passage and approval, except that for and during a period of sixty days after such approval no holder of a license or an extension thereof issued by the Secretary of Commerce under said Act of August 13, 1912, shall be subject to the penalties provided herein for operating a station without the license herein required.

SEC. 41. This Act may be referred to and cited as the Radio Act of 1927.

The Act of March 28, 1928, c. 263, 45 Stat. 373 (U. S. C. Sup. III, Title 47, sec. 89, note), provides in part as follows:

SEC. 1. That all the powers and authority vested in the Federal Radio Commission by the Radio Act of 1927, approved February 23, 1927, shall continue to be vested in and exercised by the commission until March 16, 1929; and wherever any reference is made in such Act to the period of one year after the first meeting of the commission, such reference shall be held to mean the period of two years after the first meeting of the commission.

* * * * *

SEC. 5. The second paragraph of section 9 of the Radio Act of 1927 is amended to read as follows:

"It is hereby declared that the people of all the zones established by section 2 of this Act are entitled to equality of radio broadcasting service, both of transmission and of reception, and in order to provide said equality the licensing authority shall as nearly as possible make and maintain an equal allocation of broadcasting licenses, of bands of frequency or wave lengths, of periods of time for operation, and of station power, to each of said zones when and in so far as there are applications therefor; and shall make a fair and equitable allocation of licenses, wave lengths, time for operation,

and station power to each of the States, the District of Columbia, the Territories and possessions of the United States within each zone, according to population. The licensing authority shall carry into effect the equality of broadcasting service hereinbefore directed, whenever necessary or proper, by granting or refusing licenses or renewals of licenses, by changing periods of time for operation, and by increasing or decreasing station power, when applications are made for licenses or renewals of licenses: *Provided,* That if and when there is a lack of applications from any zone for the proportionate share of licenses, wave lengths, time of operation, or station power to which such zone is entitled, the licensing authority may issue licenses for the balance of the proportion not applied for from any zone, to applicants from other zones for a temporary period of ninety days each, and shall specifically designate that said apportionment is only for said temporary period. Allocations shall be charged to the State, District, Territory, or possession wherein the studio of the station is located and not where the transmitter is located."

The Joint Resolution of Congress approved December 8, 1926, C. 1, 44 Stat. 917, provides:

> That until otherwise provided by law, no original license for the operation of any radio broadcasting station and no renewal of a license of an existing broadcasting station, shall be granted for longer periods

than ninety days and no original license for the operation of any other class of radio station and no renewal of the license for an existing station of any other class than a broadcasting station, shall be granted for longer periods than two years; and that no original radio license or the renewal of an existing license shall be granted after the date of the passage of this resolution unless the applicant therefor shall execute in writing a waiver of any right or of any claim to any right, as against the United States, to any wave length or to the use of the ether in radio transmission because of previous license to use the same or because of the use thereof.

U. S. GOVERNMENT PRINTING OFFICE: 1930

SUPREME COURT OF THE UNITED STATES.

No. 29.—October Term, 1930.

Clinton R. White, *vs.* George E. Q. Johnson and H. D. Hayes.	On Certificate from the United States Circuit Court of Appeals for the Seventh Circuit.

[January 5, 1931.]

Mr. Justice Roberts delivered the opinion of the Court.

The Circuit Court of Appeals has certified five questions. From the statement of facts contained in the certificate it appears that since August 15, 1926, appellant has owned and operated a radio broadcasting station in Chicago and has had successive licenses from the Secretary of Commerce, and (after the enactment of the Radio Act of 1927, c. 169, 44 Stat. 1162; U. S. C. Supp. III, title 47, § 81, *et seq.*) from the Federal Radio Commission. Under those from the Commission he at first broadcasted on a wave length of 760 kilocycles with a power of 500 watts, and subsequently on a wave length of 1340 kilocycles with the same power, and was required to divide time with two other stations.

On January 12, 1928, he filed an application for renewal of his then current license, which would expire on September 1, 1928. May 25, 1928, the Commission entered a general order concerning that application and 163 others, stating that it was not satisfied that public interest, convenience or necessity would be served by granting any of them, and fixing a date for a hearing. Each applicant was notified that failing an affirmative showing that public interest, convenience or necessity would be served by granting his application it would be denied. Hearings were had on all the applications. Thereafter, on August 22, 1928, an order was promulgated by the Commission modifying the appellant's existing license by reducing the authorized power to 100 watts, and extending the term to October 1, 1928.

The approximate value of the physical equipment of appellant's station is $5,000. He has expended some $16,000 in its operation.

At the time of the Commission's action his net profits were about $400 per week. His equipment will not operate efficiently or satisfactorily at 100 watts. To broadcast with that power he will have to replace a very substantial portion of his present apparatus. The reduction in power will restrict the area which can be served to one-fourth of its former size, and will cause the loss of a large portion of his listening public and advertising clientele.

Although § 16 of the Radio Act of 1927 (U. S. C. Supp. III, title 47, § 96) authorized an appeal from the Commission's order to the Court of Appeals of the District of Columbia, it was conceded at bar that appellant took none. He filed a bill *quia timet* in the United States District Court for the Northern District of Illinois praying that the enforcement of the criminal provisions of the act against him for violation of the order be enjoined; and, upon dismissal of that bill, appealed to the Circuit Court of Appeals for the Seventh Circuit.

The questions certified follow.

"Question 1. Did a person who, prior to the enactment of the Radio Act of 1927, applied for and was granted successive licenses by the Secretary of Commerce for the operation of a broadcasting station, and who owned and continuously operated such broadcasting station, whereby it developed a following of listeners and advertisers which constituted a going business, have or acquire thereby property in the continued operation of such station, with power appropriate to continue the operation of said business, within the meaning of the word 'property' as used in the Fifth Amendment to the Constitution of the United States?

"Question 2. If the answer to Question 1 is in the affirmative, is the Joint Resolution of Congress of December 8th, 1926 valid as against the claim that by virtue of the waiver it requires it works a deprivation of such property without due process of law or a taking of private property for public use without just compensation?

"Question 3. If the answer to Question 1 is in the affirmative, is the Radio Act of 1927, as amended, valid as against the claim that, by virtue of the waiver required in the last paragraph of Section 5 and by virtue of the condition required to be contained in all licenses by subparagraph (A) of Section 11, it works a deprivation of such property without due process of law or a taking of private property for public use without just compensation?

"Question 4. If the answer to Question 1 is in the affirmative, is the Radio Act of 1927, as amended, valid as against the claim that it authorizes or requires the Federal Radio Commission, in its action on an application for renewal of license by a person such

as is described in Question 1, to take private property for public use without just compensation, either by denying such application or by granting it on such terms as virtually to destroy a going broadcasting business of such person?

"Question 5. If the answer to Question 1 is in the affirmative, is the Radio Act of 1927, as amended, valid as against the claim that it authorizes or requires the Federal Radio Commission, in acting upon an application for renewal of license by said person, to deprive such person of such property without due process of law, in that the only standards provided by the Act for the guidance of the Commission in acting upon such applications are that of 'public interest, convenience or necessity' and that set forth in Section 5 of the Amendatory Act of March 28, 1928, and in that the Act fails to require that the Commission, prior to proceeding to a hearing or decision on such application, shall specify in what respect it deems or has failed to find that the granting of such application would not serve public interest, convenience or necessity?"

Rule 37 (Par. 1) of this Court provides, *inter alia:*

. . . "Only questions or propositions of law may be certified, and they must be distinct and definite."

The court has repeatedly held that it will not answer questions of objectionable generality. *United States* v. *Worley*, 281 U. S. 339, 340; *United States* v. *John Barth Co.*, 276 U. S. 606; *United States* v. *Mayer*, 235 U. S. 55, 70; *United States* v. *Northway*, 120 U. S. 327. And a question is improper which is so broad and indefinite as to admit of one answer under one set of circumstances and a different answer under another. *Enfield* v. *Jordan*, 119 U. S. 680; *Jewell* v. *Knight*, 123 U. S. 426; *Hallowell* v. *United States*, 209 U. S. 101.

The first question inquires merely whether the employment of tangible property in an existing business begets in the proprietor a "property" in the continuance of the business, as the word "property" is used in the Fifth Amendment. It is so broad and indefinite that an answer would not necessarily be of assistance in the decision of the cause. It was never intended that in answer to a question certified, we should give a dissertation on the application of the Fifth Amendment. Were we to attempt to do so, we should have to assume the existence of facts and circumstances, the absence of which from the record might render our statements wholly irrelevant. *Reineke* v. *Gardner*, 277 U. S. 239. The essence of the amendment is its application under all the circumstances of a given case. A

broad statement as to whether a thing or a status is property within its intent might well be meaningless or misleading.

Much argument was directed to the proposition that one who first establishes a broadcasting station in and serves a given area thereby appropriates that portion of the ether which he employs or through which the station's radio activity operates; and it was suggested that in analogy to the doctrine as to appropriation of waters, *et id omne genus*, a property right is thus acquired. It was urged that the question presents this proposition; but it clearly fails so to do. We are not required to answer it.

Questions 2 and 3 are contingent upon our answer to question 1. The first asks whether, if we answer question 1 in the affirmative, the Joint Resolution of December 8, 1926, is valid as against the claim that by virtue of the waiver it requires of the applicant for a license it violates certain constitutional guaranties. The second asks whether, if our answer to question 1 be in the affirmative, the Radio Act of 1927, as amended, is valid as against the claim that by virtue of the similar waiver required in the last paragraph of Section 5, and the waiver required to be contained in all licenses, it violates the same constitutional guaranties.

The appellees concede that if a person has a right guaranteed by the Constitution, legislation requiring that such right be waived as a condition of the exercise of a privilege granted would be invalid. However that may be, no such concession calls on us to answer questions which are themselves contingent on another which we do not answer.

The fourth question asks us to say whether, if our answer to question 1 is in the affirmative, the Radio Act of 1927, as amended, is valid as against the claim that it authorizes or requires the Federal Radio Commission, in acting on an application for renewal of license by a person such as described in question 1, to take private property for public use without just compensation, by denying or granting the application on terms destructive of the going business of the applicant.

This question we need not answer, for the reasons stated as to the two preceding. But it has another fatal defect. An answer would involve merely an examination of the Act and a determination whether on its face it violates the Fifth Amendment. Neither this Court nor the court below is authorized to answer academic

questions. The constitutionality of a statute is not drawn into question except in connection with its application to some person, natural or artificial. We have above called attention to the provisions of the Radio Act which give redress against arbitrary or unjust action by the Commission. We repeat that the appellant did not see fit to avail himself of the right of appeal thereby conferred, but on the contrary chose to violate the Commission's order and to stand on an alleged constitutional right which he says the action of the Commission infringed. It would be subversive of all established principles were courts, in litigations between parties, who have reciprocal rights under the Constitution, to settle their controversies by broad statements to the effect that acts of Congress are unconstitutional upon their face; and this not only in ignorance of the circumstances and manner of the application of the statute by the administrative body, but with knowledge that the party complaining had failed to pursue the remedy provided by law.

The fifth question not only is contingent on our answer to question 1, but assumes that the Radio Act may be unconstitutional because it fails to provide a specific method of procedure and does not furnish a standard of conduct for the Commission. But the appellant's rights, as respects procedure, depend not alone on the alleged requirements of the Act, but on the adequacy of the hearing in fact afforded him; and his substantive rights under the statute depend upon the public interest, convenience or necessity in view of all the facts adduced and circumstances appearing before the Commission. We are not advised what sort of hearing was held, nor what facts were proved. If the proceeding was an unfair one, as lacking adequate notice, full hearing, or development of all relevant facts, appellant had a remedy provided by the statute, which in the orderly processes of the administration of the law he was bound to pursue. To answer the question as framed we should have to treat the proceedings before the Commission as irrelevant; to hold that body's interpretation of the language of the act as applied to appellant in all the circumstances of his case as of no moment; and to ignore his admitted failure to avail himself of the right of review conferred by the statute. The question need not be answered.

The certificate is dismissed.